IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

vs.

NATIONAL MEDIATION BOARD
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioner, Sedalia-Marshall-Boonville Stage Line, Inc. [SMB], petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered in this case on March 29, 1978.

OPINIONS BELOW

The order and judgment of the United States District Court for the Southern District of Iowa (App. A, B) are not officially reported. Jurisdiction of the District Court was conferred by

28 U.S.C. §§ 1331, 1337. The opinion and judgment of the Court of Appeals, reported at 574 F.2d 394 (8th Cir., 1978), 97 LRRM 3224 (1978), are set forth in Appendices C and D.

JURISDICTION

Jurisdiction of this Court to review, by writ of certiorari, the judgment and decision of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. Whether Petitioner, an air carrier, having alleged and submitted evidence of the National Mediation Board's failure to investigate a representation dispute under the Railway Labor Act, is subject to summary dismissal of its claims of the Agency's violations of express statutory duties, without discovery or trial on the merits, on the ground that no "gross violation" was established?

II. Whether Petitioner, an air carrier, given no notice of eligibility issues respecting dispositive disenfranchised voters, no opportunity to be heard thereon, and no factual basis for their exclusion, is entitled to the minimal rights of notice and the opportunity to be heard under the Due Process Clause of the Fifth Amendment to the United States Constitution in National Mediation Board representation proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution is set forth in Appendix E-1.

The pertinent provisions of the Railway Labor Act, as amended, 48 Stat. 1188, 45 U.S.C. §151 *et seq.*, are set forth in Appendix E-2.

STATEMENT OF THE CASE

Petitioner, a Des Moines, Iowa, air carrier, is engaged in the interstate transportation of mail, freight and passengers. (R. 3).[1]

On January 26, 1976, the National Mediation Board, [NMB], informed Petitioner, [SMB], of the Union's application for a representation election under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. (R. 53). SMB has never objected to the appropriateness of the voting unit—the craft or class of pilots and copilots. SMB cooperated with the NMB by submitting lists of its pilots and copilots and providing information respecting the duties of three employees inquired about by the NMB. (R. 53-54). It is *undisputed* that SMB was never notified prior to the NMB's certification of the Union that the voting eligibility of three other employees, Barber, Milner or Worden, who were included on the voting eligibility lists but who were disenfranchised by the NMB, was challenged or in dispute. (R. 9, 54-55).

The mail ballot election and the investigation, according to the NMB, were closed on March 29, 1976. (R. 37). On April 5, 1976, SMB first learned that nine employees had been excluded from the voting eligibility list, and two were added. (R. 54). The next day, SMB sent a telegram to the NMB, protesting the election on the grounds that eligible employees were disenfranchised and an ineligible former employee (Shaw) was permitted to vote, without notice to SMB or opportunity to

[1] "R" references are to the appendix filed in the Court of Appeals.

be heard. (R. 36). On April 7, 1976, the NMB informed SMB "your telegram was not timely received by the Board" and that under its rules "a carrier does not have party standing in a representation dispute." The same day the Union was certified as the exclusive collective bargaining representative by a *one vote margin*. (R. 37-39).

Petitioner promptly filed a written application with the NMB, requesting a vacation of the certification and an investigation of voting eligibility of excluded employees Barber, Milner, Reeves and Worden, and of former employee Shaw, setting forth specific supporting facts. (R. 40-43). On May 7, 1976, the NMB Executive Secretary Quinn wrote SMB that the Agency denied the application in "executive session", determined that the four employees had been properly excluded, and that Shaw's initially erroneous inclusion "does not materially change the outcome of the election since Shaw did not tender a ballot." (R. 47).

Attempting to determine whether there was the required investigation of voter eligibility issues, SMB submitted requests to the NMB under the Freedom of Information Act, 5 U.S.C. § 552. (R. 56-59). The NMB responded that there were no written statements regarding any employee's eligibility, and it refused to produce any written materials from its mediator assigned to the case or legal authorities upon which it relied. (R. 59-60). Four months after its initial request, SMB received the minutes of the Agency's "executive session", reflecting its brief conclusions on dispositive voter eligibility issues. (R. 66).

Petitioner's complaint in the United States District Court for the Southern District of Iowa set forth three distinct claims: (1) that the NMB violated its statutory duty to investigate issues of dispositive voters' eligibility, as required by 45 U.S.C. § 152, Ninth; (2) that the NMB, in violation of its duty under 45 U.S.C. § 152, Fourth of the Act, certified the Union as the

representative of a majority of SMB's employees; and (3) that the Agency denied Petitioner minimum procedural due process rights guaranteed by the Fifth Amendment to the United States Constitution. (R. 3-8). Petitioner, *inter alia*, prayed for an order vacating the certification and ordering a new election. The Agency's answer *admitted* that "no prior notice was given to [SMB] of the possible issue, dispute, challenge to or investigation of the voting eligibility of Wilbur Barber, Bill Milner and Blaine Worden" and *admitted* that SMB's protests and requests for an opportunity to be heard were "summarily denied." (R. 9).

Petitioner propounded written interrogatories to the NMB, pursuant to Fed. R. Civ. P. 31, again seeking to determine if any investigation occurred. (R. 13-23). After the NMB's four-month refusal to answer, the District Court granted the NMB's motion for a protective order, staying *all* discovery. (R. 91).

On June 22, 1977, the District Court granted the motions for summary judgment of the Agency and the Union. The Court held, citing *Brotherhood of Railway & Steamship Clerks v. Assn. For the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), that SMB "does have standing" to assert claims that the NMB failed to perform its statutory duty to investigate a representation dispute, noting that SMB "raises this precise question with regard to the facts of this case." (App. A, p. A-5). However, the Court concluded that "the record fails to reveal any gross violation" of the NMB's duty to investigate, finding that the NMB mediator sought information from SMB on "certain employees" and "in any event, the NMB considered [SMB's] claim that certain persons should be entitled to vote and rejected it." Thus, the Court reasoned, SMB "has no standing to raise the issues relating to these actions and decisions, and therefore no constitutional right to procedural due process in the Board's determination." The Court was "not satisfied with the result", saying that "had standing been shown, serious due process questions would have been presented." It characterized

the NMB's procedures as "out of tune with the realities of modern day labor—management relationship and current due process concepts", and invited the appellate courts to "remove this anachronism." (App. A, p. A-6).

A panel of the United States Court of Appeals for the Eighth Circuit affirmed. The Court concluded that, "on this record", the NMB performed its statutory duty to investigate voting eligibility issues, finding that its mediator communicated with SMB respecting three employees[2], and NMB "did consider some of SMB's proffered evidence" after the election. The Court "share[d] the same concerns expressed by Judge Stuart" and asserted "it is unfortunate that the statutes, and the cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort." (App. C, p. A-19).

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[2] SMB asserted the lack of investigation respecting one of these three—Reeves. However, it is undisputed on the pleadings and record that the NMB *never* notified SMB prior to the certification that the eligibility status of Barber, Milner or Worden was even in dispute, and there is *no evidence* in the record that their status was investigated, other than the NMB's May 7, 1976 conclusory letter confirming their exclusion.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Eighth Circuit Respecting the NMB's Statutory Duty to Investigate a Representation Dispute Presents Substantial Federal Questions Under the Decisions of This Court.

An air carrier's bargaining obligations under the Railway Labor Act [RLA] and the statutory sanctions for their enforcement are varied and severe. An NMB certification requires the carrier to negotiate with the union and to refrain from unilaterally changing its employees' wages, hours and conditions of employment. 45 U.S.C. § 152, Seventh and Ninth. Such obligations are judicially enforceable in an original action by the certified union. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515 (1937). Criminal fines and imprisonment are also available for violations of such duties. 45 U.S.C. § 152, Tenth. Moreover, the Civil Aeronautics Board, under the Federal Aviation Act, 72 Stat. 754, 49 U.S.C. § 1371 (k)(4), compels compliance with the RLA as a condition for holding a certificate of public convenience and necessity.[3]

These statutory duties and penalties, all of which now face this Petitioner,[4] plainly establish its standing to assert statutory violations by the Agency, under the decisions of this Court.[5]

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[3] The National Labor Relations Act [NLRA], 49 Stat. 453, 29 U.S.C. §§158(a)(5), 160, provides only that an employer's unlawful refusal to bargain is remedied through a National Labor Relations Board administrative proceeding followed by judicial enforcement of its bargaining order.

[4] The District Court, relying on its decision herein, granted the Union's motion for partial summary judgment, ordering Petitioner to negotiate, in *Teamsters v. SMB*, No. 76-325-2 (S.D. Iowa 1978), app. pending, No. 78-1178 (8th Cir.). (App. F).

[5] *See e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *U.S. v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Whether or not the RLA or the Agency's rules afford a carrier "party" status in the NMB proceedings, Petitioner's interest in a lawful investigation and election—the conditions necessary for a valid certification and Petitioner's continuing bargaining obligations—is obvious. An unlawful investigation has resulted in actual or threatened injury to this Petitioner. Petitioner "should not be required to wait and undergo a criminal prosecution as the sole means of seeking relief." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976).

In *Virginian Ry. Co., supra*, the Court stated that "the freedom of choice of representatives [is] an essential of the statutory scheme" and that the NMB has the "duty" to "investigate the dispute." 300 U.S. at 543-44. The Court noted that the RLA is "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them." 300 U.S. at 548. Significantly, the Court added that the "ultimate conclusion" of an NMB certification must be supported by "basic facts", including "the number of eligible voters", and such basic facts are "open to inquiry by the court asked to enforce the command of the statute." 300 U.S. at 562.

The District Court held that Petitioner had standing to assert the NMB's violation of its "statutory command" to investigate the "basic facts" critical to this Union's majority status and to this Petitioner's duty to bargain: the eligibility status of dispositive voters. The District Court had subject matter jurisdiction to adjudicate Petitioner's suit on the merits.

In *Brotherhood of Railway & Steamship Clerks v. Assn. for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), this Court emphasized that NMB actions in representation cases are judicially reviewable to determine "whether it performed its statutory duty to 'investigate' the dispute." 380 U.S. at 661. The District Court herein concluded that SMB "raises this pre-

cise question with regard to the facts of this case." (App. A, p. A-5). In *Railway Clerks*, United Airlines had participated in "lengthy hearings" before the NMB and had an "extended exchange of correspondence" with the NMB respecting the bargaining unit over a period of *15 years*. "In light of this background", the Court held, United was not entitled to a "full-dress hearing" and the NMB's procedures were found to comply with its statutory duty. The factual setting in *Railway Clerks* is a stark contrast to the NMB's view of this Petitioner as a disinterested interloper, not entitled to any notice of dispositive voting eligibility issues or any opportunity to be heard thereon, and its one-sided, secretive proceedings herein.[6]

Leedom v. Kyne, 358 U.S. 184 (1958), also stands for the proposition that a federal court has original jurisdiction to review and remedy a violation of an agency's statutory duty in a representation case, even in the absence of a statutory provision granting judicial review. The *Leedom* Court distinguished *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943), where a divided plurality of the Court ruled that NMB craft or class bargaining unit decisions were not judicially reviewable, expressly reserving all constitutional questions. The Court in *Switchmen's* observed, however, that in instances where there was no remedy to enforce "statutory commands" of the RLA, resulting in "robb[ing] the Act of its vitality and thwart-[ing] its purpose", the courts have jurisdiction to entertain such actions. 320 U.S. at 300. The statutory purpose of assuring that a carrier's stringent bargaining obligations under a certification are lawfully grounded is thwarted by the Eighth Cir-

[6] The NMB gave Petitioner no indication that the voting eligibility of Barber, Milner or Worden was in issue, or that former employee Shaw would be added to the list, but the Agency had *ex parte* pre-election communications with the Union respecting Shaw. (R. 73). From the record it is impossible to determine, despite the Petitioner's repeated discovery efforts, whether Barber, Milner and Worden were declared ineligible to vote *before or after* the ballots were mailed or whether or not they were tendered ballots.

cuit's adherence to a "gross violation" standard necessary for review of NMB investigations.

The decisions of the Courts below were not required by the foregoing decisions of this Court. The fundamental error of the Eighth Circuit was its refusal to permit inquiry by the District Court into the basic facts of voter eligibility and the NMB's investigation of them. The "gross violation" test necessary to withstand a summary judgment motion has no support in this Court's decisions. It cannot be determined whether *any* "violation" occurred without discovery of the facts respecting the elusive investigation and a fully developed trial record.[7] The Courts below erroneously concluded that Petitioner was simply challenging the "quality and result" of the NMB's investigation. (App. A, p. A-5-6; App. C, p. A-15). As the Eighth Circuit found, this Court in *Railway Clerks, supra*, fully considered the carrier's claim and all the facts bearing on the Agency's investigation. (App. C, p. A-14-15).[8] As the Eighth Circuit found, this Petitioner asserted "no investigation had been made" as to three dispositive voters' eligibility. (App. C, p. A-9). The record consisted of Petitioner's affidavit, denying any notice or investigation of Barber, Milner and Worden, and the NMB's conclusory letter, referring generally to an "investigation." (R. 53-69, 44-48). There is no record that the NMB had any evidence from any source supporting the exclusion of these three employees. There was, at the very least, a genuine question of material

[7] Ironically, the Eighth Circuit was sufficiently disturbed and concerned by the NMB's post-election reversal of its eligibility determination on Shaw that it ordered the production of evidence from the bench (App. G), yet Petitioner was arbitrarily denied all discovery rights. *See* 4 MOORE'S FEDERAL PRACTICE §26.26; 8 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Civil §§ 2035, 2037.

[8] *WES Chapter v. NMB*, 314 F.2d 235 (D.C. Cir. 1962), relied on by the Courts below, is readily distinguishable. There, the NMB "held a hearing" and "representatives of both [the Union] and the employer were present at the hearing." 314 F.2d at 237, n. 8.

fact respecting the disputed "investigation", sufficient to preclude summary judgment.[9]

The Courts below erroneously adjudicated Petitioner's rights without any proof or consideration of numerous crucial facts: What investigation did the NMB conduct? What facts were provided to the NMB respecting the duties of Barber, Milner and Worden? What "chief pilot duties" or "functionally distinct work" (the NMB's stated basis for their exclusion) did they perform? The Courts below could not determine if the NMB breached its statutory duty without a record showing whether the Agency had evidence of such basic facts. The NMB has admitted that it has no such evidence from any source. (R. 59). This Court should forthwith vacate the judgments below and remand the case for discovery and trial.[10]

The Eighth Circuit, condemning the NMB's "unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort", preferred the "protections afforded a noncarrier employer by the National Labor Relations Act." (App. C, p. A-19). Contrary to the Court's view, Petitioner has a remedy under well settled judicial principles, and need not look to Congress as its sole source of relief. The RLA and the NLRA both provide that the employer's bargaining duty arises upon designation of a union by a majority of employees, and each requires the NMB and NLRB, respectively, to "investigate" a representation dispute.[11] This Court, in both *Railway Clerks, supra*, and *Leedom*,

[9] *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *See* 6 MOORE'S FEDERAL PRACTICE ¶ 56.15 [1.-00], 56.15 [6]; 10 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Civil § 2725.

[10] *Maggio v. Zeitz*, 333 U.S. 56, 77 (1947), (misapplication of controlling precedent, resulting in failure to consider essential facts, requires reversal and remand).

[11] 45 U.S.C. §152, Fourth and Ninth; 29 U.S.C. §§159 (a), (c). The NLRA does not require post-election hearings. *U. S. Rubber Co. v. NLRB*, 373 F.2d 602, 604 (5th Cir. 1967).

supra, upheld the standing of the employer, and the jurisdiction of the federal courts, to adjudicate the issue of these agencies' duties to comply with statutory commands. The rules of each agency specify that evidentiary hearings may be held on voter eligibility issues arising during their investigations, with participation by the employer.[12] The various courts of appeals have repeatedly held that the NLRB abused its discretion by arbitrarily refusing to conduct post-election hearings when challenges to dispositive voters' eligibility or objections to the election were supported by evidence.[13] This Petitioner presented evidence supporting the voting eligibility of the four disenfranchised employees and requested an opportunity to be heard, both of which the NMB summarily rejected. There is no rational basis in the provisions of the two statutes, in the rules of the two agencies, or in the decisions of the courts, "permit[ting] such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort." (App. c, p. A-19).

II. The Decision of the Eighth Circuit Respecting the NMB's Statutory Duty to Investigate Representation Disputes Presents an Irreconcilable Conflict With International In-Flight Catering Co., Ltd. v. NMB, 555 F.2d 712 (9th Cir. 1977).

In *International In-Flight Catering Co., Ltd. v. NMB*, — F. Supp. —, 92 LRRM 3553 (D. Hawaii 1976), the Court va-

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[12] 29 C.F.R. §102.69(c); 29 C.F.R. §1202.8.

[13] *E.g., Beaird-Poulan Div., Emerson Electric Co. v. NLRB*, 571 F.2d 432 (8th Cir. 1978); *Firestone Textiles Co. v. NLRB*, 568 F.2d 499 (6th Cir. 1977); *NLRB v. Ortronix, Inc.*, 380 F.2d 737 (5th Cir. 1967); *U.S. Rubber Co. v. NLRB, supra*, note 11; *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965); *NLRB v. Joclin Mfg. Co.*, 314 F.2d 627 (2d Cir. 1963). In *Beaird-Poulan, supra*, a panel of two of the three Judges deciding the present case noted that a post-election hearing on disputed facts was both a constitutional and statutory requirement.

cated the NMB's certification of the union,[14] holding it was "null, void and of no effect." The Court observed that:

> Section 2, Ninth of the RLA, 45 U.S.C. § 152 requires the NMB to conduct *an adequate and bona fide investigation* of each representation dispute it determines to exist and authorizes the NMB to issue a certification of representation only in those cases where its investigation establishes *competent evidence* that a majority of the employees in the craft or class have chosen or designated an individual organization to represent them for bargaining purposes. 92 LRRM at 3557, (emphasis added).

The Court found that the carrier presented information to the NMB showing that cards designating the Teamsters as the bargaining agent were represented to employees to be authorizations for an election, and that "the NMB has at all times refused to explain either to [the carrier] or to this court what investigation it conducted in this case." 92 LRRM at 3557.

The Ninth Circuit affirmed, 555 F.2d 712. Distinguishing *Switchmen's Union of North America, supra*, the Court stated that "reviewing whether the NMB made its statutory investigation at all" was within its jurisdiction. The Court pointed out that in *Railway Clerks, supra*, this Court ruled that the carrier's statutory claim "was reviewable." The Court conceded it was "undisputed that the NMB undertook some limited form of an 'investigation' " but noted that in the District Court "the NMB maintained a 'stonewall' approach to the investigation issue and failed to introduce any evidence whatsoever which disclosed the extent of their investigation, if any, other than a signature check of the cards." The Court held "it is not unreasonable to conclude that there was no investigation." 555 F.2d

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[14] While the certification was based on authorization cards, rather than an election, the NMB has such authority. 45 U.S.C. §152, Fourth. *cf., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-600 (1969).

at 718. Regarding the NMB's "adamant and unyielding stance" in refusing to present evidence of its investigation, the Court observed that a government agency, as any other litigant, "cannot dictate which rules it will obey and which it will disregard." 555 F.2d at 720.

The actions and posture of the NMB in the instant case parallel its stance in *In-Flight*. In each case, the carrier's protest to the Teamsters' certification and request for an investigation were rejected out of hand. In each case, the Agency "stonewalled", refusing to produce competent evidence establishing an adequate and bona fide investigation. The Ninth Circuit held that "some limited form of 'investigation' " did not fulfill the NMB's statutory responsibility, but here the Courts below rubber-stamped the exclusion of three voters (Barber, Milner and Reeves) on the conclusionary basis that "they perform functionally distinct work activities," and the exclusion of the fourth (Worden) on the mistaken notion the carrier was making a "post-election challenge" to another employee (Wold), previously included on the carrier's list. (App. C, p. A-15-16).[15]

That the NMB sought information from Petitioner relative to several non-dispositive voters and claimed to consider SMB's proferred evidence (App. A, p. A-5; App. C, p. A-15-16) would not satisfy the Ninth Circuit's statutory investigation standard. The NMB, in other cases, has frequently upheld the voting eligibility of employees temporarily on leave or with some non-pilot work activities.[16] Such individual eligibility issues necessarily require an investigation of all the facts regarding the employment relationship.[17] Whether the NMB undertook such an

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[15] Petitioner did not "challenge" Wold; it contended that both Worden (disenfranchised) and Wold (permitted to vote) were *both eligible* because they were on the same temporary medical leave status and included on the list of eligible voters. (R. 42).

[16] 2 CCH LabL.Rep. ¶2595.715, .73, .741, .781. (NMB decisions are not officially reported.)

[17] *NLRB v. United Insurance Co. of America, Inc.*, 390 U.S. 254 (1968).

investigation is not disclosed by the record. The Courts below erroneously believed they were forbidden by this Court from determining if such an investigation occurred.

The decision of the Eighth Circuit simply cannot be reconciled with *In-Flight*. There was no "adequate and bona fide investigation" of dispositive voter eligibility issues by the NMB. There was no "competent evidence" justifying the Agency's clandestine restructuring of the voting eligibility list or its subsequent reaffirmation of voter exclusions in "executive session". This absence of essential evidence was due to the NMB's "stonewalling" of this Petitioner and the District Court, and to the tolerance by the Eighth Circuit of the NMB's "adamant and unyielding stance." This case presents an equally "egregious set of circumstances," to use the Eighth Circuit's description of *In-Flight, supra*. (App. C, p. A-16). The present irreconcilable conflict in the courts of appeals respecting a significant question of federal law requires a definitive decision of this Court.

III. The Decision of the Eighth Circuit That Petitioner, in the Circumstances of This Case, Was Entitled to No Procedural Due Process in the NMB's Proceedings Presents Substantial Questions of Constitutional Law.

The District Court recognized "serious due process questions", but because that Court summarily dismissed Petitioner's statutory claims, finding no "gross violation" by the NMB, it concluded Petitioner had "no constitutional right to procedural due process in the Board's determination." (App. A, p. A-6). The Eighth Circuit correctly found that Petitioner's due process claim challenged the lack of notice of dispositive voter eligibility issues and the opportunity "to present evidence regarding those persons who were excluded." It upheld the dismissal of Petitioner's constitutional claim on the basis that the RLA and *Railway Clerks, supra*, did not grant a carrier "party"

status in NMB representation proceedings or mandate that the Agency hold a "hearing." (App. C, pp. A-18-19).

The summary dismissal of Petitioner's constitutional claim was not required by the RLA or the decisions of this Court. Petitioner does not seek the "full panoply of procedural protections", *Railway Clerks, supra,* at 667, but merely its right to the minimal procedural due process guarantees of notice and the opportunity to be heard during the Agency's representation proceedings. Admittedly, the RLA does not require a formal, full-dress hearing on representation disputes, but no federal administrative agency can extinguish Petitioner's fundamental Fifth Amendment rights. In *Railway Clerks, supra,* the carrier participated for fifteen years in the NMB's craft or class investigation, and this Court held that no further "hearing" was required. However, this Court has recognized that adjudicative fact-finding proceedings, (*e.g.*, the determination of individual employees voting eligibility herein), require greater procedural safeguards than legislative or rule-making decisions of general applicability, (*e.g.*, the determination of an appropriate craft or class in *Switchmen's Union of North America, supra,* or *Railway Clerks, supra*).[18] Here, Petitioner's liberty and property interests, described in Part I above, were abridged by the NMB's telegram, "executive session" and conclusory letter, with no pretense of allowing SMB the measure of notice and opportunity to be heard the carrier had received in *Railway Clerks, supra.* Here the manner in which the Board has discharged its function cannot be characterized as "fair" or "equitable" and the results, as indicated by the opinions of the Courts below, are anything but "admirable." *See Railway Clerks, supra* at 668.

This Court has spoken forcefully of the importance of procedural due process in government proceedings. "The history

[18] *Bi-Metallic Investment Co. v. Board of Equalization,* 239 U.S. 441 (1915); *Escalara v. New York City Housing Authority,* 425 F.2d 853 (2d Cir. 1970), *cert.denied,* 400 U.S. 853 (1970).

of liberty has largely been the history of observance of procedural safeguards." *McNabb v. U. S.,* 318 U.S. 332, 347 (1943).

> Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied . . . [due process] is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration. *Shaughnessy v. U. S. ex rel. Mezei,* 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting).

"[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a plaintiff's substantive assertions," and because of "the importance to organized society that procedural due process be observed," damages are recoverable for its denial even without proof of actual injury. *Carey v. Piphus,* — U.S. —, 55 L.Ed.2d 252, 98 S.Ct. — (1978).

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-172 (1951), Mr. Justice Frankfurter discussed the significance of notice and the opportunity to be heard:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights.
>
> * * * * * * *
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> No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important for a popular government, that justice has been done.

Specifically, due process requires notice reasonably calculated to inform interested persons of issues or allegations and the opportunity to present their evidence or objections. *Memphis Light, Gas and Water Div. v. Craft*, — U.S. —, 56 L.Ed. 2d 30, 98 S.Ct. — (1978). Moreover, as the Court in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) stressed:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and *the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue* * * * This Court has been zealous to protect those rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. (emphasis added).

The decision maker must also set forth the reasons for its decision and the evidence it relied on. *Wichita Railroad & Light Co. v. Public Utilities Comm. of Kansas*, 260 U.S. 48, 57-59 (1922).

It is undisputed that Petitioner was given no notice during the "investigation", which the NMB closed on March 29, 1976, that nine employees would be deleted from the voting eligibility list, that two would be added, or that the voting eligibility of three employees was even disputed or under investigation. Petitioner, in jeopardy of serious statutory penalties (administrative, civil and criminal), immediately protested the certification and requested the NMB to investigate the facts respecting dispositive employees' eligibility when it learned of their exclusion. After no notice, the NMB, in a secret "executive session", rejected Petitioner's application with no reasoned statement of its investigation[19] or indication of the evidence relied on. The

[19] *E.g., Dunlop v. Bachowski*, 421 U.S. 560, 571-72 (1975).

Agency's failure to appraise Petitioner of the factual basis for its eligibility determinations or permit Petitioner to contest them is not simply procedural irregularity, it is a denial of due process of law.

This Court has said that NLRB procedures are "constrained by the Due Process Clause of the Fifth Amendment." *Int. Tel. & Tel. Corp. v. NLRB*, 419 U.S. 428, 448 (1975). The Court has recognized that minimal due process guarantees apply in parolee revocation proceedings, *Morrissey v. Brewer*, 408 U.S. 471 (1972); in student suspensions from public school, *Goss v. Lopez*, 419 U.S. 565 (1975); in teacher termination cases, *Board of Regents v. Roth*, 408 U.S. 564 (1972); in state garnishment proceedings, *Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969) and in the termination of a welfare recipient's benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970). Surely the statutory obligation of the NMB to investigate a representation dispute, coupled with Petitioner's substantial and continuing bargaining duties, the possibility of criminal penalties and even the loss of its authority to engage in commerce, and the fact that plenary judicial review of NMB certifications is not obtainable, demand that minimal procedural due process protections be recognized here. *See Hannah v. Larche*, 363 U.S. 420 (1960).

The Courts below, albeit reluctantly, permitted the NMB to "unilaterally and arbitrarily" impose the Union on this Petitioner "without a hearing of any sort", and upon an administrative proceeding totally "out of tune" with "current due process concepts." The Courts below granted this Agency an immunity from elementary constitutional strictures on the premise that this Court's decisions required them to do so. This Court must review the NMB's proceedings herein, so devoid of "fundamental fairness, shocking to the universal sense of justice," [*Betts v. Brady*, 316 U.S. 455, 462 (1942)], in light of the Court's settled due process holdings.

CONCLUSION

Petitioner does not propose to rewrite the Railway Labor Act or divest the National Mediation Board of necessary administrative discretion. The statute commands that an investigation of disputed issues in representation cases be conducted, and this Court has ruled that such investigations are judicially reviewable. In 1943, the Agency apparently believed judicial review was "profitable".[20] In 1965, when this Court last examined an NMB case, the Court's careful scrutiny of the facts established a lawful investigation. *Railway Clerks, supra.* This case presents a significant question: has this Court allowed the NMB such administrative *carte blanche* in its representation proceedings that it places the Agency beyond the constraints of the Due Process Clause of the Fifth Amendment? The Eighth Circuit's decision permits even "unilateral and arbitrary" proceedings to qualify as an "investigation" and pass constitutional muster.

This Court has consistently recognized that Government's respect for the fundamental guarantees of the Bill of Rights is essential to the preservation of ordered liberty. Mr. Justice Stewart, dissenting in *Railway Clerks, supra,* at 672, 677, cautioned that because NMB craft or class decisions were insulated from judicial review "makes it all the more imperative that the Board be required to operate by fair and lawful procedures" and he criticized the NMB's "mistaken belief that its duty is to encourage collective representation in the airline industry . . ." Since then, the NMB's representation procedures have been sharply attacked,[21] and both the Eighth and Ninth Circuits

[20] *Switchmen's Union of North America, supra,* at 319, n. 18 (dissenting opinion).

[21] Curtin, *The Representation Rights of Employees and Carriers: A Neglected Area Under the Railway Labor Act,* 35 J.Air L. & Com. 468 (1969).

have condemned the lack of fundamental fairness in NMB recent investigations. The dramatic increase in airline industry organizational activity[22] indicates that a re-examination of the Agency's anachronistic procedures in light of "current due process concepts" is overdue. The circumstances of this case compel such re-examination.

Because the Courts below misapplied applicable precedents of this Court, denying discovery and trial of essential facts indispensable to the determination of whether an investigation occurred, and denying Petitioner minimal procedural due process, this Court should vacate the judgment below and remand for a trial on the merits and an adjudication of the Petitioner's constitutional claim in light of the constraints of the Due Process Clause of the Fifth Amendment to the United States Constitution. In the alternative, it is submitted that the Court should grant this Petition for Writ of Certiorari on all questions presented.

Respectfully submitted,

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[22] The number of employees involved in 1976 NMB representation cases increased five-fold from 1975 and 83% were airline employees. NMB Forty-Second Ann.Rep. 28 (1976).

APPENDIX

APPENDIX A

Opinion of the
United States District Court for the
Southern District of Iowa

In the United States District Court
Southern District of Iowa
Central Division

Sedalia-Marshall-Booneville Stage Line, Inc.,
Plaintiff,
vs.
National Mediation Board,
Defendant,
and
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Intervenor.

Civil No. 76-180-1

ORDER

(Filed January 22, 1977)

This is an action brought under the provisions of the Railway Labor Act, 45 U.S.C. §§ 151, et seq., by plaintiff Sedalia-Marshall-Boonville Stage Line, Inc. (SMB) against defendant National Mediation Board (NMB or Board), an agency of the Federal Government. The International Brotherhood of Teamsters has been permitted to intervene as a defendant. Now

before the Court are defendant's motion to dismiss or for summary judgment, filed January 17, 1977, and the intervenor's motion for summary judgment, filed February 28, 1977. Plaintiff has resisted both motions and the matter came on for hearing before the Court on April 22, 1977. For reasons stated below, the Court is of the opinion that the pending motions must be granted.

Plaintiff, SMB, is a "carrier" within the meaning of the Railway Labor Act and is thus regulated by its provisions. In January, 1976, plaintiff was informed by the NMB that the Airline Division of the Teamsters had filed an application under Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, for investigation of a representation dispute among plaintiff's employees classified as pilots or co-pilots. Pursuant to defendant's request, plaintiff submitted to the NMB mediator an original, and subsequently revised, list of names of pilots and co-pilots within its employ. On March 5, 1976 the NMB found a dispute to exist among the employees in the craft or class and authorized a mail ballot election. After tabulation of votes based upon its determination of the proper electorate, the NMB informed plaintiff that of fifty-nine eligible employee voters, thirty had cast votes in favor of the Union.

On April 6, 1976, plaintiff protested the election to the NMB on the grounds that eligible employees were not permitted to vote and that an ineligible former employee had been permitted to do so. Plaintiff also requested an opportunity to present evidence and argument. However, the Board promptly overruled the protest as untimely and certified the Teamsters as the duly authorized representative of plaintiff's employees. The Board also noted the carrier's lack of party status in a representation dispute as a further reason for denying the protest.

Thereafter on April 14, 1976, plaintiff filed an application to vacate the certification and for a formal evidentiary hearing based on certain allegedly incorrect determinations of voter

eligibility, which were specified by the plaintiff. On May 7, 1976, the Board denied this application again citing plaintiff's lack of party status to a representational dispute, but further determined that at any rate, all contested employees had been correctly excluded from the eligibility list.

Plaintiff's complaint and application for injunctive relief alleges separate claims in three divisions: (1) that the NMB failed to comply with its statutory duty set forth in 45 U.S.C. § 152, Ninth to investigate issues of voting eligibility arising during the course of a representational dispute; (2) that as a result the NMB in violation of its duty under 45 U.S.C. § 152, Fourth, certified the Teamsters as representative of a majority of plaintiff's pilots and co-pilots; and (3) that the actions and conduct of defendant denied plaintiff procedural due process rights guaranteed under the Fifth Amendment of the Constitution. Plaintiff prays for an Order of this Court restraining the enforcement of the NMB's certification of the Teamsters, for a determination of the voting eligibility of certain employees, and/or for an Order directing the NMB to permit plaintiff to present evidence and argument thereon and to conduct a new election. The NMB denies that it failed to investigate as alleged, that its certification was improper, or that it violated plaintiff's constitutional rights. It does admit that no prior notice was given plaintiff of its action in disqualifying plaintiff's employees, Wilbur Barber, Bill Milner, and Blaine Worden.

Defendant and defendant-intervenor seek to dismiss this action arguing that plaintiff lacks standing to maintain the same, and because the Court is without jurisdiction over the subject matter.

The major objective of the Railway Labor Act was "the avoidance of industrial strife, by conference between the authorized representatives of employer and employee". Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 547. It

gives to employees the right to organize and bargain collectively through a representative of their own selection, doing away with company interference. *Id.* at 543. Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, establishes the process for selection of the employees' representative. It is therein provided that the National Mediation Board shall, upon request, "investigate" representative disputes and certify the authorized representative to the disputants and the carrier. Upon receipt of the Board's certification, the carrier is required to "treat with" the certified representative as the representative of the designated craft or class. In conducting its statutorily prescribed investigation, the Board is authorized to take a secret ballot or utilize any other appropriate method of ascertaining the choice of the employees. Furthermore, § 162 Ninth states that "[i]n the conduct of any election for the purposes herein indicated the Board shall designate who may participate and establish rules to govern the election * * *".

JURISDICTION

It is clear that the court's jurisdiction in reviewing employee representation proceedings under the Act is extremely limited. Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943); Railway Clerks v. Employee's Assn., 380 U.S. 650 (1965). Judicial intervention, however, is permissible to consider an allegation that the Board has ignored an express command of the Act. See Leedom v. Kyne, 358 U.S. 184 (1958). The assertion of such jurisdiction must be confined to instances of constitutional dimension or gross violation of the statute, "where the error on the merits is as obvious on the face of the papers as the violation of specific statutory language * * *". Teamsters v. Railway, Airline, and Steamship Clerks, 402 F. 2d 196 (D.C. Cir., 1968). As stated by the Court in Railway Clerks, supra, "[w]e think that the

Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute". 380 U.S. at 661. Plaintiff raises this precise question with regard to the facts of this case. The Court holds that plaintiff does have standing to raise this issue, Railway Clerks, supra, 380 U.S. at 660; International In-Flight Catering Co. v. NMB, ... F. 2d ... (9th Cir., decided June 10, 1977); however, the Court is of the opinion that the record fails to reveal any gross violation of the Board's express obligation under the Act to investigate representative disputes, The NMB's actions in International In-Flight Catering Co. were clearly beyond its statutory authority. Such is not the case here.

The Board's duty to investigate is a duty to make such investigation as the nature of the case requires. *Railway Clerks*, supra at 662. An investigation is essentially informal, not adversary, and is not required to take any particular form. *Id.* These principles are particularly apt, the Court stated, "where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case". *Id.* Here, the Board assigned mediator Edward F. Hampton to commence investigation of the SMB case. Hampton requested and obtained from plaintiff's executive vice-president, Robert Grammer, lists of employees within the designated class of pilots and co-pilots, discussed with Grammer the eligibility status of certain employees, and solicited information concerning certain employees work assignments and duties. An election was then held, the result ascertained, and the Board authorized a bargaining representative. Clearly, an "investigation" of the dispute, sufficient to preclude the finding of a gross statutory violation or of an ignorance of an express command of the Act, was undertaken. See Aeronautical Radio, Inc. v. National Mediation Board, 380 F. 2d 624 (D.C. Cir., 1967). Plaintiff appears to be challenging the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility

made by the Board. Such judgments, however, are committed to Board discretion, and are not within the permissible ambit of judicial review. See WES Chapter v. National Mediation Board, 314 F. 2d 235 (D.C. Cir., 1962); Decker v. Venezolana, 258 F. 2d 153 (D.C. Cir., 1958). Consequently plaintiff has no standing to raise the issues relating to these actions and decisions, and therefore has no constitutional right to procedural due process in the Board's determination. In any event, the NMB considered plaintiff's claim that certain persons should be entitled to vote and rejected it. The Court cannot interfere with that decision.

The Court is not satisfied with the result it feels compelled to reach under the authorities. Defendants state that at the present time we are not "in tune" with the circumstances existing when the Railway Labor Act created the NMB. I believe it is more accurate to state that NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts. Had standing been shown, serious due process questions would have been presented. Perhaps Congress or the appellate courts will take steps to remove this anachronism. See the chastisement of the NMB in International In-Flight Catering Co., Ltd. v. National Mediation Board, decided by the Ninth Circuit June 10, 1977.

IT IS THEREFORE ORDERED that the defendant and defendant-intervenor's motions for summary judgment shall be granted.

Signed this 22 day of June, 1977.

W. C. STUART
U. S. District Judge
Southern District of Iowa

APPENDIX B

Judgment of the District Court

United States District Court
for the
Southern District of Iowa—Central Division

Sedalia-Marshall-Booneville Stage Line, Inc.,

vs.

National Mediation Board, Defendant, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervenor.

Civil Action File No. 76-180-1

JUDGMENT

(Filed June 22, 1977)

This action came on for hearing before the Court, Honorable William C. Stuart, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant, National Mediation Board, and defendant-intervenor's motions for summary judgment be and are hereby granted.

Dated at Des Moines, Iowa, this 22nd day of June, 1977.

FRED O. MORROW
Acting Clerk of Court

APPENDIX C

Opinion of the United States Court of Appeals for the Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

No. 77-1606

Sedalia-Marshall-Boonville Stage Line, Inc.,
Appellant,
v.
National Mediation Board,
Appellee,
and
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 11, 1978

Filed: March 29, 1978

Before Gibson, Chief Judge, Van Oosterhout, Senior Circuit Judge, and Ross, Circuit Judge.

ROSS, Circuit Judge.

Sedalia-Marshall-Boonville Stage Line, Inc. (hereinafter SMB), an air carrier, appeals from an adverse decision of the

district court dismissing its complaint on a summary judgment motion, FED. R. CIV. P. 56. The case arose under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, wherein SMB challenged the decision of the National Mediation Board, a government agency, to certify the International Brotherhood of Teamsters as the bargaining representative of SMB's employees.

In January 1976 the Teamsters filed an application with the Board seeking to become the labor representative of SMB's pilots and co-pilots. In a subsequent election in March 1976 the Teamsters, according to the Board, won the right to represent these employees, with the union receiving 30 votes among the 58 eligible voters.[1]

In general terms, SMB has disagreed with the Board on who was eligible to vote in the representation election. By telegram to the Board on April 6, 1976, SMB protested the election results, contending that eligible employees had not been permitted to vote and that an ineligible former employee had voted; further SMB complained that these decisions were made without notice to the employer or an opportunity for the employer to be heard.

Specifically, SMB alleged that no *investigation* had been made by the Board as to the eligibility status of four named employees, and that no notice was given to SMB of a possible dispute concerning these employees' eligibility. After a summary rejection by the Board of the employer's complaints on April 7,

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[1] The ballots were printed with only two alternatives presented to the employees: 1) to vote for the Teamsters; and 2) to vote for another union to be written in. The failure to include a box for no union representation probably accounts for the fact that only 30 votes were cast; and in an election as close as this could, in our opinion, have made a difference in the outcome. However the Supreme Court has specifically approved this form of ballot in NMB elections. *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 668, 669 n. 5 (1965).

1976, and a renewal of the complaint by SMB in the form of an "Application to Vacate Certification and for Formal Evidentiary Hearing," the Board responded on May 7, 1976, with a letter from its Executive Secretary. The letter related the outcome of an executive session of the Board which reaffirmed that the excluded employees had been "correctly excluded" from voting; however, the Board admitted that one individual declared eligible by it, Shaw, should have been ineligible as SMB had alleged. The Board concluded that the error was harmless, however, since Shaw had not voted in the election anyway.[2] In the May 7 letter the Board also briefly gave a reason for excluding each of the four named individuals whom SMB had complained were erroneously declared ineligible.

As a legal matter, SMB's petition in the district court alleged that, based on the foregoing set of facts, the Board had: (1) failed to comply with § 152, Ninth of the Act by failing to investigate a representational dispute and issues of employee voting eligibility; (2) designated an organization as the employee representative which had not been lawfully authorized by a majority of a craft or class of employees in violation of § 152, Fourth of the Act; (3) denied SMB minimal due process rights under the fifth amendment.

The statute with which this case is primarily concerned is § 152, Ninth of the Railway Labor Act, which sets out the duties of the National Mediation Board when a contest over employee representation arises:

Section 152, Ninth:

> *Disputes as to identity of representatives; designation by Mediation Board; secret elections*

[2] According to an affidavit supplied by the Board pursuant to our request at oral argument, Shaw's elimination from eligibility reduced the number of eligible voters from 59 to 58. There still however were 30 votes for the union and the affiant certified that Shaw had not voted.

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, *it shall be the duty of the Mediation Board upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute*, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. *In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.* The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph. (Emphasis added).

The district court concluded that its jurisdiction to review employee representation proceedings under the Act was limited to "instances of constitutional dimension or gross violation of the statute," further concluded that no such violation of the

statutory duty to "investigate" a representation dispute was present in this case, and granted defendant's summary judgment motion. The employer, SMB, appealed this holding, the holding that the employer had no procedural due process rights in the Board's eligibility determinations, and the granting of a protective order which had stayed discovery against the Board.

We affirm though we share the same concerns expressed by Judge Stuart in his opinion.[3]

The appellant's request that we invalidate the certification is based on two assertions of error: that the Board had failed to undertake an investigation to determine the eligible electorate, and that the Board had failed to include the employer as a participant in the Board's processes for defining the electorate. On the basis of *Brotherhood of Railway & Steamship Clerks v. Association For the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (hereinafter *Railway Clerks*) and other Supreme Court authority, we do not agree that the district court erred.

In *Railway Clerks, supra*, 380 U.S. 650, the Supreme Court set out the principles for evaluating a claim that a decision of the National Mediation Board was subject to judicial review. It is first clear that the Court considered judicial review to be sparing. Citing its earlier opinion, *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943),[4] the Court in *Railway Clerks, supra*, 380 U.S. at 659, first stated that § 152, Fourth of the Railway Labor Act had written into law the "right" of the majority of a class or craft of employees to choose who shall be their representative for purposes of the Act. Congress had determined to protect that "right" in § 152, Ninth of the Act which gave the Mediation Board the "power to resolve controversies" concerning representation. *Id.* The power to protect the employees' rights thus resided in the Board, not in the judiciary:

> Congress decided on the method which might be employed to protect this "right"; and that where Congress "has not expressly authorized judicial review," *Id.*, at 301, "this Court has often refused to furnish one even where questions of law might be involved," *Id.*, at 303. The Court's conclusion was that "the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

Railway Clerks, supra, 380 U.S. at 659.

To these general principles of judicial nonreview, the Court added one limitation: judicial power may be exerted to require the Board to exercise a duty imposed under § 152, Ninth of the Act. *Railway Clerks, supra*, 380 U.S. at 661. "[T]he Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute." *Id.* (footnote omitted).

After a review of applicable "principles," the Court in *Railway Clerks* proceeded to consider, and reject, the employer's

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[3] Judge Stuart writes:

> The Court is not satisfied with the result it feels compelled to reach under the authorities. Defendants state that at the present time we are not "in tune" with the circumstances existing when the Railway Labor Act created the NMB. I believe it is more accurate to state that NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts. Had standing been shown, serious due process questions would have been presented. Perhaps Congress or the appellate courts will take steps to remove this anachronism. See the chastisement of the NMB in International In-Flight Catering Co., Ltd. v. National Mediation Board, decided by the Ninth Circuit June 10, 1977.

[4] In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943), it had been held that the court did not have the power to review a decision of the Board, objected to by a union, which designated all yardmen of the carriers in the New York Central System as participants in the same representation election.

assertion that the Board had failed to perform its statutory duty to investigate in making a class and craft designation for the employees; the employer had argued that the Board had made an arbitrary determination without taking evidence or making findings.

The statute admittedly required the Board to make an "investigation," but, the Court continued, "[t]his command is broad and sweeping." *Railway Clerks, supra,* 380 U.S. at 662. No particular kind of investigation is required in every case:

> We should note at the outset that the Board's duty to investigate is a duty to make *such investigation* as the *nature of the case requires.* An investigation is "essentially informal, not adversary"; *it is "not required to take any particular form."* (Footnote omitted).

Railway Clerks, supra, 380 U.S. at 662 (emphasis added). The Court then approved the sufficiency of the investigation that led to the Board's resolution of the class or craft question. The Board initially had chosen a unit that was "well-recognized" under prior Board determinations and had "proven satisfactory in actual experience." *Id.* at 665. The Court outlined the balance of the Board's preelection "investigation":

> The Board received the Brotherhood's application; it requested, received and considered statements from the carrier and the Machinists. On the basis of these preliminary actions, it scheduled an election. But it continued to correspond with United, accepting and studying its detailed application for reconsideration of the Board's decision to proceed to election in the R-1706 craft or class. Viewed alongside prior experience with the R-1706 grouping in the air transport industry this procedure clearly complied with the statutory command that the Board "investigate" the dispute. The only missing element of the

> required investigation is the election and that can now be held promptly.

Id. at 666.

Comparatively we cannot say on this record that the Board acted in excess of its powers or contrary to a statutory provision. The affidavit of the employer's vice-president, Robert Grammer, reveals evidence of the Board's investigation: the Board requested and received from SMB a list of 68 qualified pilots and co-pilots; the NMB Mediator Edward Hampton met with SMB legal counsel and Grammer to discuss the eligibility of two particular employees; subsequent to the meeting SMB submitted a revised list of eligible employees, omitting the two who had been discussed; pursuant to a later request by Mediator Hampton SMB submitted to the Board a letter explaining the work assignments and duties of three specified employees; finally prior to the election the Board notified SMB of the disqualification of two other employees.

Grammer's affidavit further stated, however, that the Board had not requested information from SMB about employees Barber, Milner or Worden, or informed SMB that their eligibility was contested.

Based on these facts admitted by SMB, we conclude that the Board did undertake to "investigate" the dispute and to designate who might participate in the election. We agree with the district court that "Plaintiff appears to be challenging the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board."

From a letter to SMB's counsel from the Board on May 7, 1976, referred to in SMB's complaint, and reprinted in full with the Board's summary judgment motion, it is clear that the Board had not failed to give consideration to Barber, Milner and Worden's eligibility:

During the course of investigation it became evident that Wilbur Barber functions as an assistant to the chief pilot and that he performs check pilot duties for the Carrier. Bill Milner also functions as an assistant to the chief pilot while James Reeves was identified in the Carrier's letter to Mediator Hampton dated March 18, 1976 as "an instructor and check pilot in the training department." All three (3) of these individuals were correctly excluded from the Mediator's finalized list of eligible voters since they perform functionally distinct work activities which would exclude them from the craft or class of Pilots and Co-Pilots.

Blaine Worden was excluded from the list of eligible voters because he performs non-pilot duties. Though the Carrier maintains that John Wold also performs non-pilot duties the Carrier failed to inform the Mediator of Wold's status and included Wold on the initial list of potential eligibles supplied to the Mediator. The Board must conclude that any post-election challenge to include John Wold on the list of eligible voters would not further the purposes of the Railway Labor Act as outlined under Section 2, therein.

Although we agree with the holding in *International In-Flight Cartering Co. v. National Mediation Board*, 555 F.2d 712 (9th Cir. 1977) urged in support of SMB's position, we do not think the facts here present the same egregious set of circumstances; there the Board's investigation prior to certifying the union consisted solely of comparing signatures on the "Request for Election" cards with signatures from the employer's payroll records, even though it was clear that the cards were requests for an election only and were not votes for representation without an election.

The present case is more like *WES Chapter v. National Mediation Board*, 314 F.2d 234 (D.C. Cir. 1962) where an eligi-

bility decision of the Board was challenged and the court declined review: "[T]he challenge by appellant does not go beyond asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority." *Id.* at 237.

We conclude that the Board did not abrogate a statutory duty in this case, and because sufficient facts to sustain this holding appear from SMB's filings, we will not consider the allegation that the district court erred in not enforcing discovery against the Board which sought information about the investigation.

SMB also claims that it was unconstitutionally excluded from participation in the Board's eligibility determinations, and that it should have been given timely notice of challenges to employee eligibility, plus a chance to present evidence regarding those persons who were excluded.

These procedural due process claims are adequately answered in *Railway Clerks, supra*, 380 U.S. 650. There, as here, the employer had argued:

> [T]hat since the Act compels it to treat with the representative chosen by the majority of its employees * * * it has a direct and substantial interest in the scope of that unit; and since the Act provides for no administrative or judicial review, due process requires that it be accorded an opportunity to participate in the proceedings by which the Board determines which employees may participate.

Id. at 660.

The Court answered first by saying that the Act does not require a hearing. (The Board itself may designate who participates or may appoint a committee of three neutral persons who

after a hearing shall designate the electroate.) *Railway Clerks, supra*, 380 U.S. at 666.

Secondly, the Court said:

> Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. *Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board.*

Id. at 666-67 (emphasis added).

The Court pointed out that an employer is "under no compulsion to reach an agreement" with the Board-certified representative. Concerning the nature of the employer's alleged interest, the Court said:

> [W]hile the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, *we cannot say that the latter's interest rises to a status which requires the full panoply of procedural protections.*

Id. at 667 (emphasis added).

It is clear that the Board did consider some of SMB's proffered evidence in this case subsequent to the election, and in fact reversed its eligibility decision as to Shaw.

We conclude that the Board's eligibility decisions and election certification are not subject to further review; the Board has not violated a statutory duty in its conduct of the investigation; it has not failed to satisfy constitutional requirements be-

cause it did not further consult SMB or make SMB a party to the proceedings which designated the employee electorate.[5]

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5] It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort. The protections afforded a noncarrier employer by the National Labor Relations Act are much to be preferred. But the responsibility to make that decision rests with Congress and not this court.

APPENDIX D

Judgment of the Court of Appeals

United States Court of Appeals
For the Eighth Circuit

No. 77-1606 September Term, 1977

Sedalia-Marshall-Boonville Stage Line, Inc.,

Appellant,

vs.

National Mediation Board,

Appellee,

and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Appellee.

JUDGMENT

(Filed April 28, 1978)

Appeal from the United States District Court for the Southern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Southern District of Iowa and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 29, 1978

(See attached sheet for cost information.)

A true copy.

Attest:

ROBERT C. TUCKER
Clerk, U.S. Court of Appeals,
8th Circuit

(Seal)

APPENDIX E

Constitutional Provisions Involved
Statutory Provisions Involved

APPENDIX E-1

CONSTITUTION OF THE UNITED STATES

Amendment V

* * * nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

APPENDIX E-2

Railway Labor Act, as Amended

45 U.S.C. § 151 *et seq.*

Section 1(a):

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly

> settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.
>
> * * *

Section 2, Fourth:

> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.
>
> * * *

Section 2, Seventh:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.
>
> • • •

Section 2, Ninth.

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to goven the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies

> of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 2, Tenth:

> Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

APPENDIX F

Order of the District Court Granting Partial Summary Judgment in Civil No. 76-325-2

In the United States District Court, Southern District of Iowa, Central Division

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Plaintiffs,

vs.

Sedalia-Marshall-Boonville Stage Lines, Inc., Defendant.

Civil No. 76-325-2

ORDER

(Filed March 2, 1978)

The Court has before it plaintiffs' motion for partial summary judgment filed August 23, 1977. Defendant's resistance was filed September 15, 1977 and plaintiffs' reply on October 4, 1977. The original complaint was filed on behalf of the Union on October 18, 1976 pursuant to the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 et seq. seeking to restrain the defendant (company) from engaging in allegedly unlawful conduct violative of its employees' rights and defendant's alleged duty to bargain in good faith. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1337.

Prior to the commencement of this action, however, defendant herein caused to be filed with this Court a related action, Sedalia-Marshall-Boonville Stage Lines, Inc. v. National Mediation Board, Civil No. 76-180-1 in which SMB sought to have the National Mediation Board (NMB) certification of the Union invalidated due to alleged defects in the NMB's investigatory procedures. This action (the certification action) was terminated when on June 22, 1977 this Court granted the Board's and Union's motions for summary judgment, in effect saying that the Court was without authority to review the quality and result of the Board's investigation which was found to clearly have been conducted.

SMB then sought a stay of the judgment in the certification action which was denied by Court Order on October 14, 1977. In the Union's motion for summary judgment currently pending in the instant action the Union is seeking this Court's affirmative injunction requiring the company to "treat with plaintiff International Union . . ."; to exert reasonable efforts to reach agreement concerning rates of pay, rules and working conditions; to settle all disputes and to establish, pursuant to agreement with its employees, a system board of adjustment for resolution of grievances and disputes. The Company, in resistance, asserts a number of alleged issues of material fact which it contends preclude summary judgment. As the Court views this resistance, however, any alleged factual disputes were issues contested in the previous certification action which were either resolved adversely to the Company's position or found to not be susceptible to review. The certification action is now on appeal to the Eighth Circuit Court of Appeals. The Court is of the opinion that such alleged factual issues cannot preclude summary judgment in this action if otherwise warranted. Although both parties request oral hearing, the Court believes that the prior hearing in the certification action gave ample opportunity for the parties to present their views.

Section 152 Ninth of the Act provides in pertinent part that:

> Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.

Section 152 First provides:

> It shall be the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

The obligation to exert reasonable efforts to make and maintain agreements is mandatory rather than hortatory and that such obligation is enforceable by the Courts. Chicago & N.W. Ry. v. United Transportation Union, 402 U.S. 570 (1971); Virginia R. System v. System Federation No. 40, 300 U.S. 515 (1937). The Supreme Court has unequivocally stated that

> The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.

Virginia R. System v. System Federation No. 40, supra at 548.

In the Court's opinion there exists no genuine issue of material fact which this Court may properly consider, and further the Court believes that plaintiff is entitled to summary judgment as a matter of law. The Court would note that to deny

summary judgment at this time would be, in effect, to grant the stay which was previously denied in the certification action. In addition to believing that summary judgment is warranted, the Court also remains convinced that denial of that stay was proper. As was previously indicated, if the Company desires that further action be stayed, application may be made to the Circuit Court of Appeals.

Finally as was noted previously the Court cannot force the parties to reach agreement. The Court can, and by this Order intends to insure that proper negotiations take place.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment shall be, and the same is hereby granted.

IT IS FURTHER ORDERED that Sedalia-Marshall-Boonville Stage Line shall be, and is hereby ordered to treat with plaintiff International Union as a representative of the craft or class composed of its pilots and co-pilots and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions as is required by the Railway Labor Act, sections 151 et seq.

Signed this 2 day of March, 1978.

/s/ W. C. Stuart
Chief Judge
Southern District of Iowa

APPENDIX G

Post-Argument Submissions to the Court of Appeals

United States Department of Justice
Washington, D.C. 20530

January 12, 1978

Telephone:
FTS-739-3688

AGerson:lac
145-135-19
Mr. Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, Missouri 63101

Re: Sedalia-Marshall-Boonville Stage Line, Inc. v. National Mediation Board and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (C.A. 8, No. 77-1606).

Dear Mr. Tucker:

Pursuant to the request of the court at yesterday's hearing of the above-captioned case that I furnish it with answers to the following questions: (1) the effect of the Board's disqualification of Shaw on the results of the National Mediation Board election, (2) whether the Board notified the Teamsters Union of the designated employee electorate prior to the election, and (3) whether the Board here notified the ineligible employees of that fact prior to the election, I am submitting herewith the

following statement for distribution to Judges Gibson, Ross and Van Oosterhaut.

1. In reply to the carrier's "Application to Vacate Certification and for Formal Evidentiary Hearing" the Board, in its letter of May 7, 1976 to Mr. John R. Phillips, counsel for the carrier, stated:

> With respect to the election conducted by the Board in Case No. R-4595, however, the question of William Shaw's eligibility does not materially change the outcome of the election since Shaw did not tender a ballot in the instant election. The count of ballots remains the same: 30 ballots for the International Brotherhood of Teamsters, Airline Division. The number of employees eligible to vote is revised downward to include 58 employees. Therefore, the results of the election are not materially altered and the Board's Certification issued on April 7, 1976, remains in force (Appendix, p. 47).

We note for the record that the argument that Shaw's subsequent disqualification affected the outcome of the election was never raised by the carrier in his petition to the National Mediation Board and in his complaint and brief in the district court. Nor was it raised in his opening and reply brief before this court.

2. The Board as a matter of practice generally notifies the labor organization or organizations seeking to represent the employees of the Board's designation of the employee electorate prior to conducting an election. *The Mediator's Representation Manual* (1973), Section 314(o). This is because they, unlike the employer-carrier, are parties to the Board's proceedings. As the Supreme Court held in *Brotherhood of Railway & Steamship Clerks, et al. v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), in the passage specifically quoted to the court in yesterday's proceedings: "This [party]

status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carrier's." *Id.* at 666. In this case, we are advised by the Board that neither the carrier nor the Teamsters Union was notified by the Board of the designated eligible employee electorate prior to the election.

3. The Board does not directly notify ineligible employees of the fact of their ineligibility. We are advised by the Board that its practice is to notify the employer of the date a mail-ballot election is to be conducted and is requested to post notices of such. Here SMB was notified by the Board on March 9, 1976 that a mail-ballot election would be conducted with the ballots to be returned to the NMB by March 29, 1976 (Appellant's brief, p. 10). Those employees who are determined to be eligible to vote are notified of this fact by receipt of a mailed ballot.

Yours very truly,

/s/ ALLAN GERSON
ALLAN GERSON
Attorney
Appellate Section,
Civil Division

Enclosures

cc: John R. Phillips, Esquire
510 Hubbell Building
Des Moines, Iowa 50309

Richard Wilder, Jr., Esquire
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

United States Court of Appeals
For the Eighth Circuit

Robert C. Tucker, Clerk

St. Louis, Mo. 63101

January 25, 1978

Mr. Allen Gerson
Attorney, Appellate Section
Civil Division
United States Department of Justice
Washington, D.C. 20530

Re: No. 77-1606. Sedalia-Marshall-Boonville Stage Line v. National Mediation Board, et al

Dear Sir:

We have been directed by the Court to advise you that the Court is not satisfied with your reply and that the Court wants to be advised in writing as to the first vote count and the second count after the disqualification of Shaw. Your response should show the vote for the Union and the vote for the company in each instance and it should be certified. We would appreciate receiving your response within the next ten days.

Very truly yours,

ROBERT C. TUCKER, Clerk
by:

Chief Deputy

dw

copy

Mr. John R. Phillips
510 Hubbell Building
Des Moines, Iowa 50309

Mr. Richard Wilder, Jr.
25 Louisiana Ave., N.W.
Washington, D.C. 20001

United States Department of Justice
Washington, D.C. 20530

February 6, 1978

AG:lac
145-135-19

Telephone:
FTS-739-3331

Mr. Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, Missouri 63101

Re: Sedalia-Marshall-Boonville Stage Line v. National Mediation Board, et al. (C.A. 8, No. 77-1606).

Dear Mr. Tucker:

Pursuant to your letter of January 25, 1978, relative to the above-captioned case, I am enclosing for distribution to the Panel an affidavit of Rowland K. Quinn, Jr., Executive Secretary of the National Mediation Board. As requested, the affidavit discusses the effect of Shaw's disqualification on the election by the National Mediation Board on this case.

We will be glad to furnish the Court with any additional information that it may request.

Yours very truly,

ALLAN GERSON
Attorney
Appellate Section, Civil Division

Enclosures

cc: Mr. John R. Phillips
510 Hubbell Building
Des Moines, Iowa 50309

Mr. Roland Wilder, Jr.
25 Louisiana Ave., N.W.
Washington, D.C. 20001

AFFIDAVIT

City of Washington
District of Columbia } ss.

Rowland K. Quinn, Jr. being duly sworn deposes and says:

I am the Executive Secretary of the National Mediation Board (NMB) and as part of my official duties I have custody of the NMB's files and records. I am the same Rowland K. Quinn, Jr. who previously submitted an affidavit in this case (App. pp. 34-48). This affidavit is submitted in response to this Court's request of January 25, 1978, for certification of the ballot count before and after the disqualification of William Shaw, a former employee of Appellant, from voting in an NMB election among Appellant's Pilots and Co-Pilots which resulted in the certification of Intervenor as the collective bargaining representative of these employees.

1. The ballot utilized in the election is identical in form to the NMB ballot specifically approved by the Supreme Court in *Brotherhood of Railway, Airline & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 656, 657, 668-671 (1965). The ballot (attachment A hereto) contained instructions to voters that "If less than a majority of the employees [eligible to vote] cast valid ballots, no representative will be certified", thus treating the failure to cast a ballot as a vote against representation by the Intervenor.

2. The results of the ballot count prior to Shaw's disqualification showed the following:

Number of eligible voters	59
Void ballots	0
Votes cast for Intervenor	30
Valid votes counted	30

3. The results of the ballot count following Shaw's disqualification showed the following:

Number of eligible voters	58
Void ballots	0
Votes cast for Intervenor	30
Valid votes counted	30

4. As the NMB noted to the Appellant when the NMB sustained the objection to Shaw's eligibility (App. p. 47), Shaw did not cast a ballot in the election. Therefore, the fact that Shaw was subsequently struck from the list of eligible voters did not change the outcome of the election. In fact, it only increased the Intervenor's margin of victory. Because Shaw's disqualification decreased the number of eligible voters from 59 to 58, the final tally of votes for the Intervenor became 30 out of 58, rather than 30 out of 59. Accordingly, the NMB had no basis for disturbing its certification of the Intervenor and declined Appellant's request to do so.

/s/ ROWLAND K. QUINN, JR.
Executive Secretary

Subscribed and sworn to before me this 6th day of February, 1978.

Mary Catherine Price
Notary

My Commission Expires May 14, 1981

United States of America

Official Ballot of National Mediation Board

Case No. R-4595

Involving Employees of
Sedalia, Marshall, Boonville Stage Line

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act. The National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Railway Labor Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified.

If you desire to be represented by:

International Brotherhood of Teamsters
Mark an "X" in this square ..... ☐

If you desire to be represented by:

ANY OTHER ORGANIZATION OR INDIVIDUAL

Write name of such organization or individual on the line below:

....., AND

Mark an "X" in this square ..... ☐

NOTICE

1. This is a SECRET BALLOT. DO NOT SIGN YOUR NAME.

2. Marks in more than one square make ballot void.

3. Do not cut, mutilate or otherwise spoil this ballot. If you should accidentally do so, you may return the spoiled ballot at once to the Mediator and obtain a new one.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum order and judgment of the United States District Court (Pet., App. A, B) are not reported. The opinion of the Eighth Circuit Court of Appeals (Pet., App. C) is reported at 574 F.2d 394, and its judgment is set forth in Appendix D of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Carrier's interest in the selection of its employees' bargaining representative rises to a status requiring the National Mediation Board to accord it procedural protections, in the form of a hearing on voter eligibility issues, during the Board's investigation of a representation dispute among the Carrier's employees.

2. Whether the Board performed its statutory duty to investigate a representation dispute among the Carrier's employees in the craft or class of pilot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, are set forth in Appendices E-1 and E-2 of the Petition.

STATEMENT

This litigation concerns the National Mediation Board's investigation of a representation dispute among the Petitioner's 58 pilots and its subsequent certification of the Respondent Union as their authorized representative for collective bargaining purposes. Thirty of the 58 eligible pilots voted by secret ballot for representation by the Union; the remaining 28 eligibles in the craft or class did not vote in the mail referendum election. (R. 39, 47; Pet., App. G, at 36) The controversy that led to this litigation involved the Petitioner's claim that *three* other persons it employed were eligible to vote. Both lower

Courts rejected the Petitioner's attempt to litigate these eligibility questions, either in constitutional guise or on the theory that the Board had violated its statutory duty to "investigate" the dispute, holding that the Board's eligibility determinations were not subject to judicial review. The Respondent Union and the Petitioner are now bargaining under an injunction issued on March 2, 1978 in a related case initiated by the Union. (Pet., App. F)

The underlying representation dispute began on January 19, 1976, when the Union applied to the Board for an investigation of the representation desires of the Petitioner's pilots and co-pilots in an appropriate craft or class. (R. 72) The case was docketed on February 17, 1976, and the Board's Mediator began his field investigation in Des Moines, Iowa, on March 3, 1976. (R. 72-73) He checked the authorization cards submitted by the Union with its application (R. 73), and obtained from the Petitioner a list of 66 names of employees allegedly covered by the application. (R. 54) This list omitted the names of two mechanics which were on a list submitted earlier, and were removed at the Mediator's request. (R. 53) The Mediator communicated with the Petitioner regarding five other individuals, including Reeves; however, he did not request information about Milner, Barber or Worden from the Carrier. (R. 54-55) The final eligibility list used in the mail referendum election contained fifty-nine names, including that of W. Shaw, a union adherent who had been discharged on February 27, 1976. (R. 53, 72-73) The election closed on March 29, 1976. (R. 54) Since thirty employees had voted for representation, a majority, the Board certified the Union as the craft or class representative on April 7, 1976. (R. 38-39, 73-74)

One week later, the Petitioner moved the Board to vacate its certification and schedule a formal evidentiary hearing (R. 40) on its contentions that several individuals were improperly held ineligible to vote, while Shaw

was improperly allowed to vote. (R. 42) The Board treated this motion as one for reconsideration. On May 5, 1976, it denied the motion because its investigation had disclosed that: (1) Milner functioned as an assistant chief pilot; (2) Barber performed check pilot duties in addition to functioning as an assistant chief pilot; (3) Reeves worked as a check pilot and instructor in the training department; and (4) Worden was excluded because he performed non-pilot duties.[1] (R. 46) The Board agreed that Shaw was ineligible (R. 46), but since he had not voted, the effect of his disqualification was to reduce the number of eligibles to fifty-eight and increase the Union's margin of victory. (R. 47; Pet., A-35 to -36)

The Petitioner filed suit on May 21, 1976, alleging that the Board had failed to investigate the representation dispute because it had not solicited specific information about Milner, Barber and Worden from Carrier officials, and that its due process rights had been violated because the Board had not advised the Petitioner that the above-named individuals' eligibility was in issue or afforded it an opportunity to be heard thereon. The relief requested included an injunction barring enforcement of the Union's certification, another determination of voter eligibility, an evidentiary hearing and a new election. (R. 6-8) In November, 1976, the Petitioner served written interrogatories on the Board seeking to discover, *inter alia*, employee ballots, identities of persons the Mediator contacted in resolving eligibility issues, and internal reports and memoranda. (R. 13-23) The Board's motion for a protective order staying discovery was granted (R. 91) pending disposition of the summary judgment motions filed by the Board and the Union. (R. 24, 32, 69)

[1] At the time of the election, Worden had been medically unfit to fly for approximately one year. He had been working in the air freight department and at other non-pilot duties on a regular basis, since he was not able to retain his pilot's license. (R. 83-84)

The District Court granted summary judgment in favor of the Board and the Union. It held that "an 'investigation' of the dispute, sufficient to preclude the finding of a gross statutory violation or of an ignorance of an express command of the Act, was undertaken." (Pet., A-5) Voter eligibility issues are committed to the Board's discretion, "and are not within the permissible ambit of judicial review." (Pet., A-6) A panel of the Eighth Circuit Court of Appeals affirmed. The record could not support a finding "that the Board acted in excess of its powers or contrary to a statutory provision. . . ." (Pet., A-15) Instead, it showed "that the Board did undertake to 'investigate' the dispute and to designate who might participate in the election. . . ." *Id.* Accordingly, the Court of Appeals held:

> "that the Board's eligibility decisions and election certification are not subject to further review; the Board has not violated a statutory duty in its conduct of the investigation; it has not failed to satisfy constitutional requirements because it did not further consult SMB or make SMB a party to the proceedings which designated the employee electorate." [Pet., A-18 to -19.]

ARGUMENT

I.

THE DECISIONS BELOW ARE PLAINLY CORRECT AND COMPELLED BY THIS COURT'S PRECEDENTS

Based on this Court's decisions in *Switchmen's Union* v. *NMB*, 320 U.S. 297 and *Railway Clerks* v. *Non-Contract Employees*, 380 U.S. 650, the Courts below concluded that jurisdiction to review the Board's actions in representation disputes is extremely limited. For Congress' intent in Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, " 'seems plain—the dispute was to reach its last terminal point when the administrative finding was

made. There was to be no dragging out of the controversy into other tribunals of law. . . .'" *Id.* at 659, quoting 320 U.S. at 305. "[T]he Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute. . . ." 380 U.S. at 661 (footnote omitted). It must be remembered, however,

> "that the Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.' . . . These principles are particularly apt here where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." [380 U.S. at 662 (citations and footnote omitted).]

After a searching inquiry, the District Court held that the Board had fulfilled its statutory duty to investigate the representation dispute among the Petitioner's pilots and granted summary judgment in favor of the Board and the Union. (Pet., App. A) In affirming the District Court's judgment, the Court of Appeals noted that the Petitioner Carrier's opposition papers showed that the Board had conducted a field investigation during which it received two lists of potential voters from the Carrier, and communicated with the Carrier's representatives relative to the eligibility of seven individuals; that it had defined the electorate and ascertained the employees' representation desires in a secret ballot election; and that the Board, as evidenced by its decision of May 7, 1976 (R. 44), "had not failed to give consideration to Barber, Milner and Worden's eligibility . . . ." (Pet., A-15) This Court's precedents were correctly applied to these facts.

Both lower Courts concluded that the Petitioner's suit "'appears to be challenging the quality and result of

[the] investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board.'" (Pet., A-5 to -6, A-15) In their view, the Petitioner's challenge "'does not go beyond asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority.'" (Pet., A-17); *WES Chapter* v. *NMB*, 314 F.2d 234, 237 (C.A. D.C.). This showing fell short of demonstrating that the Board had violated an "express command" of the statute, an element necessary to establish the District Court's jurisdiction. *Leedom* v. *Kyne*, 358 U.S. 184. The Board's certification cannot be reviewed on the alleged ground that an erroneous assessment of facts led the Board to a conclusion not comporting with the law. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481. Since the Petitioner's own submissions affirmatively showed that the Board had conducted an "investigation," there was no need to consider whether the District Court erred in not enforcing discovery against the Board. (Pet., A-17)

As the lower Courts held, the Petitioner's constitutional claim is no different from that asserted and rejected by this Court in *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. 650. There, as here, it was claimed that carriers "should be accorded a greater role in the Board's investigation." *Id.* at 667. Noting that the Act does not require a hearing, and that the sole requirement resulting from a Board certification is collective bargaining,[2] this Court concluded that the Car-

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[2] "It must be remembered that United is under no compulsion to reach an agreement with the certified representative. As Chief Justice Stone said in *Virginian R. Co.* v. *System Federation No. 40*, [300 U.S. 515, 558-59], 'The quality of the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power.' . . ." [380 U.S. at 667.]

rier's interest in representation issues did not rise "to a status which requires the full panopoly of procedural protections. . . ." *Id.* at 667. Moreover, the Court made clear that a requirement for full hearings in representation disputes was neither desirable nor contemplated by Congress because it would prevent the prompt resolution of representation disputes. *Id.* at 668.

> "Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carrier's. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board." [*Id.* at 666-67.]

The Petitioner seeks to distinguish *Railway Clerks* on grounds that the Board there had solicited the Carrier's statement regarding the Brotherhood's application; that after it had scheduled an election the Board continued to correspond with the Carrier, accepting and studying its detailed application for reconsideration of the decision to proceed to election in a craft or class the Carrier opposed; and that the Carrier had participated in a hearing involving other carriers some fifteen years earlier. (Pet., at 9) In the instant case, the Board similarly requested the Petitioner to make a statement with respect to the Union's application. (Exh. 3 to Griswold Aff'd., R. 73) The Board also received and carefully considered the Petitioner's motion to reconsider the eligibility rulings it opposed. (R. 40-47, 65)

Furthermore, the Petitioner did not object to the Board's craft or class determination (Pet., at 3), the resolution of which could have imposed some additional burden on its business operations (380 U.S. at 667), but contested

only eligibility issues in which the Carrier's business interest is not at all apparent. Since the Petitioner's interest in the representation proceeding in issue here is less compelling, and it was permitted to participate to the same degree as the Carrier in *Railway Clerks*, it is certain that the Board's investigation satisfied "any possible constitutional requirements that might exist . . . ." 380 U.S. at 368; see also *Virginian Ry.* v. *System Federation No. 40, supra*, 300 U.S. at 558.

II.

THERE IS NO CONFLICT OF DECISION

There is a remarkable uniformity among the several Circuit Courts of Appeal in their application of the rules announced in *Switchmen's Union* and *Railway Clerks*. Over the years, the Courts have declined to review the Board's discretionary actions in representation cases despite a variety of legal challenges. See *Aeronautical Radio, Inc.* v. *NMB*, 380 F.2d 624 (C.A. D.C.), cert. denied, 389 U.S. 912; *Air Line Stewards & Stewardesses* v. *NMB*, 294 F.2d 910 (C.A. D.C.), cert. denied, 369 U.S. 810; *BLF & E* v. *Kenan*, 87 F.2d 651 (C.A. 5), cert. denied, 301 U.S. 687; *Decker* v. *Venezolana*, 258 F.2d 153 (C.A. D.C.); *IBT* v. *BRAC*, 402 F.2d 196 (C.A. D.C.), cert. denied, 393 U.S. 848; *Radio Officers' Union* v. *NMB*, 181 F.2d 801 (C.A. D.C.); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (C.A. 2), cert. denied, 376 U.S. 913; *UNA Chapter, FEIA* v. *NMB*, 294 F.2d 905 (C.A. D.C.), cert. denied, 368 U.S. 956; *WES Chapter* v. *NMB, supra*, 314 F.2d 234; *World Airways, Inc.* v. *NMB*, 347 F.2d 350 (C.A. 9), cert. denied, 383 U.S. 926, reh'g. denied, 384 U.S. 914.

Contrary to the Petitioner's assertion (Pet., at 12-15), the Ninth Circuit Court of Appeals' decision in *International In-Flite Catering Co.* v. *NMB*, 555 F.2d 712

(C.A. 9) is not in conflict with the lower Court's decision in this case. In *IICC*, the Board certified the Union as the representative of the Carrier's employees on the basis of a check of authorization cards signed by a majority of employees in the craft or class. No secret ballot election was held. The cards used were entitled in boldface capital letters, "Request For Employees Representation Election . . . ." The Ninth Circuit held that the Board had not fulfilled its statutory duty to "investigate" because its action avoided the principal issue of whether the cards sufficiently indicated that signatory employees were selecting the Union as their representative.

Finding that the cards were to request an election only, a view consistent with various oral and written representations by union representatives, the Court concluded that the Board's position "contradicts the intended meaning of the employees who had signed the Request for Election card, the plain language on the card itself, and the spirit of the RLA . . . ." *Id.* at 719. Thus it held "that the NMB's certification . . . failed to comply with the requirements of § 2, Ninth, of the RLA and constituted an act contrary to the statute. . . ." *Id.* The Ninth Circuit emphasized the narrow reach of its ruling: "Whatever else may be said of prior case decisions, none of them address the facts of this case where simple, direct, plain language representations were made to IICC's employees and were ignored, and are still ignored by the NMB." *Id.* at 718.

IICC has no application to the reviewability issue in this case where it is undisputed that a field investigation took place, eligibility rulings were made and a secret ballot election was held. The difference between the two cases is critical. In *IICC*, according to the Ninth Circuit, the Board's action was not calculated to discover the wishes of a majority of craft employees as to their choice of bargaining representative. This was

equivalent, in the Court's view, to not making a statutory investigation at all. The Court below agreed with the Ninth Circuit's decision in *IICC*, but it did "not think the facts here present the same egregious set of circumstances." (Pet., A-16) For while the Petitioner's challenge criticized the quality and result of the Board's field investigation, as well as the fact-findings set forth in its decision of May 7, 1976 (R. 46), it also showed that the Board investigated the dispute employing methods and procedures it alone had authority to select. *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. at 662.

III.

THERE ARE NO IMPORTANT QUESTIONS OF FEDERAL LAW

The Petitioner contends that its unhappiness with the Board's internal procedures and its Mediator's supposed lack of diligence somehow give rise to an important, unresolved question of Federal law which this Court should settle. There are at least two difficulties with this view: First, this Court's decisions in *Switchmen's Union* v. *NMB*, *supra*, 320 U.S. 297 and *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. 650, already have settled any important question suggested by the Petition. and, second, the Petitioner's contention that the Board's investigation was insufficient rests on narrow, particularized facts concerning the purported voting eligibility of three individuals and the Board's examination of their status. In short, the Petitioner asks this Court to reconsider decisions which have been uniformly accepted and applied by the lower Courts, and to intervene in a unique squabble of interest only to the immediate participants.[3]

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[3] The Petitioner's complaint that it was denied discovery rights by the District Court is frivolous since its own affidavit, exhibits and pleadings show that the Board conducted a statutory investi-

The basis on which the Petitioner urges reconsideration is "that a re-examination of the . . . [NMB's] anachronistic procedures in light of 'current due process concepts' is overdue." (Pet., at 21) For support, it looks to comments made by the lower Courts in this case (Pet., A-12 n.3, A-19 n.5), where their preference for the National Labor Relations Board's procedure is made clear. It is ironic that the Court of Appeals chose to make its comment at this time when the NLRB's representation procedures, which afford employers full party status, are currently the subject of much criticism and active legislative consideration because they permit, through extensive litigation, lengthy delays in the exercise of employee selection rights.[4] More importantly, the Court of Appeals correctly acknowledged that the responsibility for effecting a change in the Railway Labor Act's representation machinery rests with Congress and not the Judiciary. (Pet., A-19 n.5) As the Second Circuit Court of Appeals aptly stated:

> "But the claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed . . . .

gation. In any event, its complaint hardly amounts to a viable claim that the Eighth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 19(b).

[4] See *1976 Interim Report and Recommendations of the Chairman's Task Force On the NLRB*, in "BNA Labor Relations Yearbook" 332-38 (1976). H.R. 8410, 95th Cong., 1st Sess. (1977), passed on Oct. 6, 1977, 123 *Cong. Rec.* H10713-14 (daily ed. Oct. 6, 1977); H.R. Rep. No. 95-637, 95th Cong., 1st Sess. 5 (1977); S. 2467, 95th Cong., 2d Sess. (1978), recommitted to the Senate Comm. on Human Resources on June 22, 1978, 124 *Cong. Rec.* S9412 (daily ed. June 22, 1978); S. Rep. No. 95-628, 95th Cong., 2d Sess. 4 (1978).

> For the courts to require the Mediation Board to transform itself into an adjudicative or prosecutorial agency like the NLRB or to impose themselves upon it would distort the entire congressional scheme . . . ." [*Ruby* v. *American Airlines, Inc.*, *supra*, 323 F.2d at 256.]

As recently as 1965, this Court considered and settled the very questions raised by the Petitioner. *Railway Clerks* v. *Non-Contract Employees*, *supra*, 380 U.S. 650. In doing so, it carefully considered the interests of carriers in the representation disputes of their employees, the Board's informal procedures, and the burden that greater carrier involvement in representation investigations "would visit upon the administration of the Act." *Id.* at 667. Balancing these considerations, this Court held that the Board's procedures satisfied "any possible constitutional requirements that might exist. . . ." *Id.* at 668. Nothing has happened since that time to warrant re-examination of its conclusion other than the criticisms made in the lower Courts' decisions. On the other hand, informed commentary indicates that "the Railway Labor Act procedures have satisfactorily resolved all representation disputes in the railroad industry and all such disputes involving flight employees in the airline industry. . . ." Rehmus, *The First Fifty Years —And Then?*, in "The Railway Labor Act at Fifty" 241, 245, 254 (1976).

The Petitioner's suggestion that an important Federal question somewhere lurks in the Board's determination that three individuals employed by a third-level air carrier were ineligible to vote defies reason. It is nothing more than an invitation, best declined, to embroil an already overburdened Federal Judiciary in the minutiae of day-to-day labor relations and the internal workings of the Board. In *Boire* v. *Greyhound Corp.*, *supra*, 376 U.S. 473, this Court found it necessary to caution the lower Courts that while they might intervene in representation

matters to strike down administrative action contrary to a specific statutory prohibition, they were precluded from reviewing discretionary administrative action turning on the agency's assessment of essentially factual issues. (Compare Pet., at 10) Because the Courts below understood that their authority was narrowly confined to inquiring whether an express statutory command was ignored, review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 77-1809

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-8 to A-19) is reported at 574 F. 2d 394. The opinion of the district court (Pet. App. A-1 to A-6) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-20 to A-21) was entered on March 29, 1978. The petition for a writ of certiorari was filed on June 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Mediation Board fulfilled its statutory duty to investigate the representation dispute among petitioner's employees.

2. Whether the Due Process Clause requires the National Mediation Board to hold a hearing for the purpose of determining the eligibility of individual employees to vote in representation elections.

STATUTE INVOLVED

Section 2, Ninth of the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 152, Ninth provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT

In March 1976 the National Mediation Board conducted a mail ballot election to resolve a representation dispute that had arisen among petitioner's pilot and co-pilot employees.[1] Prior to holding the election, the Board conducted an investigation and determined that 59 of petitioner's employees were eligible to participate in the balloting. At the election, 30 of these employees cast votes in favor of representation by the respondent union, and the union thus received the majority needed for certification (Pet. App. A-34 to A-38).

Petitioner filed an application with the Board to vacate the certification of the union. Petitioner contended that four employees had been wrongly disqualified from voting at the representation election while one ineligible employee (Shaw) had been permitted to vote (Pet. 4; R. 40-43).[2] On May 7, 1976, the Board informed petitioner that the Board had reexamined the voting qualifications of the employees and concluded that, while the four employees had been correctly excluded from the voting

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[1]The ballot used by the Board was identical in form to that approved in *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 656, 657, 668-671.

[2]"R." refers to the record filed in the court of appeals.

unit, the Board had erred in qualifying Shaw to vote. The Board observed that the error was immaterial to the outcome of the election, however, because Shaw had not voted for the union and the union thus retained a majority of the qualified votes (R. 47; see Pet. App. A-10 n. 2).

Petitioner then instituted this suit in the United States District Court for the Southern District of Iowa. It sought to have the Board's certification of the union set aside and a new election ordered. Petitioner contended that the Board had failed to comply with its duty under Section 2, Ninth of the Railway Labor Act "to investigate" the employee representation dispute. 45 U.S.C. 152, Ninth. Petitioner also argued that the Board's failure to hold an evidentiary hearing on petitioner's assertion that four employees were improperly excluded from the representation election violated the Due Process Clause of the Fifth Amendment.

The district court granted the Board's motion for summary judgment (Pet. App. A-1 to A-6). The court observed (*id.* at A-5) that this Court has held that, in enacting Section 2, Ninth of the Act, "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." *Brotherhood of Railway & Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 662 (hereinafter *Railway Clerks*). The district court held that, under the decision in *Railway Clerks*, the Board had fulfilled its statutory responsibility "to investigate" the employee representation dispute in this case by (1) assigning a mediator to solicit and gather information concerning the work assignments and duties of petitioner's employees; (2) designating the eligible employee electorate; (3) conducting an employee-representation election; and (4) considering and acting on petitioner's post-election

arguments concerning the voting eligibility of particular employees (Pet. App. A-5 to A-6). With regard to petitioner's contention that the Board's refusal to hold a hearing on the eligibility dispute violated the Due Process Clause, the district court held that decisions on eligibility are committed to the discretion of the Board and are not subject to judicial review, and that petitioner therefore has no procedural right to participate in the Board's investigations (Pet. App. A-6).

The court of appeals affirmed. The court observed that, under *Railway Clerks, supra,* 380 U.S. at 662, the Board must conduct "such investigation as the nature of the case requires," but that the investigation is " 'not required to take any particular form' " (Pet. App. A-14). The court concluded that the enquiry by the Board in this case fulfilled its statutory duty "to 'investigate' the dispute and to designate who might participate in the election" (Pet. App. A-15).

The court of appeals also rejected petitioner's due process arguments. the court noted that in *Railway Clerks, supra,* this Court rejected the claim that "due process requires that [the employer] be accorded an opportunity to participate in the proceedings by which the Board determines which employees may participate." 380 U.S. at 660; see *id.* at 666-667. The court of appeals stated that petitioner's objections had, in any event, been received and acted on by the Board, and that the Constitution does not require the Board to "further consult" with petitioner in the representation investigation (Pet. App. A-18 to A-19).

ARGUMENT

The decision of the court of appeals applies settled principles to the particular facts of this case. There is no conflict among the circuits and thus no reason for further review.

1. Petitioner contends (Pet. 7-12) that the Board failed to conduct an investigation adequate to fulfill its duties under Section 2, Ninth of the Railway Labor Act. Petitioner does not dispute that the decision on employee eligibility is a matter that ultimately rests in the discretion of the Board, and that "the Board's action * * * is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the [representation] dispute." *Railway Clerks, supra,* 380 U.S. at 661.[3] Petitioner maintains, however, that the Board's enquiry into the dispute in this case was not an "investigation" of the kind required by the Act (Pet. 10).

As the court of appeals pointed out (Pet. App. A-14), although the Railway Labor Act requires the Board to "investigate" the representation dispute, " '[t]his command is broad and sweeping.' " *Railway Clerks, supra,* 380 U.S. at 662. The Act does not require any particular kind of investigation in every case. Instead,

> the Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is "essentially informal, not adversary"; it is "not required to take any particular form." * * * These principles are particularly apt here where Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case. [*Railway Clerks, supra,* 380 U.S. at 662.]

[3]See also *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 303; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.,* 320 U.S. 323, 336; *Aeronautical Radio, Inc.* v. *National Mediation Board,* 380 F. 2d 624 (C.A. D.C.), certiorari denied, 389 U.S. 912; *Decker* v. *Venezolana,* 258 F. 2d 153 (C.A. D.C.); *Ruby* v. *American Airlines, Inc.,* 323 F. 2d 248 (C.A. 2), certiorari denied, 376 U.S. 913; *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board,* 294 F. 2d 905 (C.A. D.C.), certiorari denied, 368 U.S. 956; *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board,* 314 F. 2d 234 (C.A. D.C.); *Pan American World Airways* v. *International Brotherhood of Teamsters,* 275 F. Supp. 986 (S.D. N.Y.), affirmed *sub nom. Brotherhood of Railway, Airline and Steamship Clerks* v. *Pan American World Airways,* 404 F. 2d 938 (C.A. 2).

The purpose of the investigation is to protect the right of the "majority of any craft or class of employees * * * to determine who shall be the representative of the craft or class for the purposes of this chapter." Section 2, Fourth, 45 U.S.C. 152, Fourth. In the course of its investigation into the employees' representation dispute, the Board is to employ "a secret ballot" or "any other appropriate method of ascertaining the names of [the employees'] duly designated and authorized representatives * * *." Section 2, Ninth. In conducting such an election, the Board is to ensure that "the choice of representatives by the employees [is made] without interference, influence or coercion exercised by the [employer]" (*ibid.*). The Act further provides that "the Board shall designate who may participate in the election * * * or may appoint a committee of three neutral persons who after hearing shall within ten days designate the [eligible] employees * * *" (*ibid.*). Although the Act thus provides broad guidance to the Board concerning the objectives and nature of the investigation to be made, Congress left the Board free to determine "the methods and procedures which it should employ in each case." *Railway Clerks, supra,* 380 U.S. at 662.

The district court properly concluded, on the facts of this case, that "[c]learly, an 'investigation' of the dispute, sufficient to preclude the finding of a gross statutory violation or of an ignorance of an express command of the Act, was undertaken" (Pet. App. A-5):

> Here, the Board assigned mediator Edward F. Hampton to commence investigation of the SMB case. Hampton requested and obtained from plaintiff's executive vice-president, Robert Grammer,

> lists of employees within the designated class of pilots and co-pilots, discussed with Grammer the eligibility status of certain employees, and solicited information concerning certain employees work assignments and duties. An election was then held, the result ascertained, and the Board authorized a bargaining representative.

The court of appeals agreed that, on this record, "we cannot say * * * that the Board acted in excess of its powers or contrary to a statutory provision" (Pet. App. A-15). The court stated that the Board's letter to petitioner's counsel denying the request to vacate the union's certification is persuasive evidence "that the Board had not failed to give consideration" to the voting qualifications of the employees in the representation dispute (*ibid.*). The court of appeals held that petitioner's claim "does not go beyond asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory * * * authority" (*id.* at A-17, quoting *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board*, 314 F. 2d 234, 237 (C.A. D.C.)). The court of appeals thus correctly concluded that, under settled principles, petitioner's claim must be rejected. There is no reason for further review of the largely factual determination made by the court of appeals and the district court in this case.

Petitioner asserts (Pet. 12-14) that the decision in this case conflicts with the Ninth Circuit's decision in *International In-Flight Catering Co.* v. *National Mediation Board*, 555 F. 2d 712 (C.A. 9). *In-Flight* held that, on the facts of that particular case, the Board had failed to "perform its statutory duty to 'investigate' the [representation] dispute." 555 F. 2d at 718, quoting *Railway Clerks, supra*, 380 U.S. at 661. The decision in *In-Flight* does not conflict with the decision in the present

case, however, for the simple reason that the facts in the two cases are different. In *In-Flight* the Board's "investigation" of the representation dispute had been limited to determining whether the signatures on the employees' "Request for Election Cards" were valid. The Board simply assumed in that case that the "Request for Election Cards" were in fact the employees' votes for union representative. 555 F. 2d at 718. On these facts, the court found in *In-Flight* that the Board had not conducted an election or otherwise determined whether the employees had intended to select the union as their representative, and thus had not conducted an investigation of the dispute.

By contrast, as the decisions of the district court and the court of appeals reveal, the Board conducted an employees' election in this case as part of a thorough investigatory enquiry. The election had been preceded by a field investigation conducted by the Board's mediator and, following the election, the Board had reconsidered and revised its decision as to the eligibility of particular employees to participate in the election. The Board's procedures here were much more thorough than the procedures disapproved in *In-Flight*.

2. Petitioner contends (Pet. 16) that the Board denied it "the minimal procedural due process guarantees of notice and the opportunity to be heard during the Agency's representation proceedings." The court of appeals (Pet. App. A-17 to A-18) properly rejected petitioner's argument.

Congress intended that the employer would be excluded from all Board proceedings to prevent interference with the employees' organizational efforts.[4] Thus, under the

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[4]Section 2, Fourth of the Railway Labor Act, 45 U.S.C. 152, Fourth, provides that employee-collective organization and bargaining efforts are to be free from the employer's attempt "to

Act. "[w]hile the Mediation Board is given specified powers in the conduct of elections, there is no [statutory] requirement as to hearings." *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 304; see also *Railway Clerks, supra*, 380 U.S. at 667. Moreover, in *Railway Clerks* this Court explicitly rejected the contention that a carrier has a constitutional right to a hearing in connection with the Board's investigation of a representation dispute.

> [W]hile the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, we cannot say that the latter's interest rises to that status which requires the full panoply of procedural protections.
>
> * * * * *
>
> Nor does the Act require that [the employer] be made a party to whatever procedure the Board uses to define the scope of the electorate. * * * Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board. [380 U.S. at 666-667.]

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influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." Section 2, Ninth provides that "the [Board] shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such [a] *manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.*" (Emphasis added). The legislative history of the Act indicates Congress' concern that the employer be removed from the employee representation process to prevent interference with organizational efforts. See Hearings on H.R. 9861 before the House Committee on Rules, 73d Cong., 2d Sess. 10-11 (1945); *Pan American World Airways* v. *International Brotherhood of Teamsters*, 275 F. Supp. 986, 998 (S.D. N.Y.).

There is nothing to warrant any different conclusion in this case.

Petitioner contends (Pet. 16-17) that, although it may not be entitled to a "full panoply of procedural protections," *Railway Clerks, supra*, 380 U.S. at 666, it is nonetheless entitled to the "minimal procedural due process guarantees of notice and the opportunity to be heard * * *." Even if this contention were correct,[5] it is apparent that petitioner *was* notified of the Board's actions and *did* receive an opportunity to contest the eligibility determinations by filing a written challenge to the certification order.[6] As the court of appeals held, "[i]t is clear that the Board did consider some of [petitioner's] proffered evidence in this case subsequent to the election, and in fact reversed its eligibility decision as to [one of the employees]" (Pet. App. A-18). There is no statutory or constitutional requirement that the Board "further consult" (*id.* at A-19) with petitioner in designating the employee electorate.

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[5]Petitioner's argument under the Due Process Clause is defective because the Board's investigation of the employees' representation dispute does not implicate any property or liberty interest of the employer. As this Court held in *Railway Clerks, supra*, 380 U.S. at 666, "it is the employees' representative that is to be chosen, not the carriers'." In the absence of a liberty or property interest, the procedural protections of the Due Process Clause are not implicated. *Meachum* v. *Fano*, 427 U.S. 215.

[6]The fact that petitioner was not notified of the Board's eligibility determinations until after the election was held is not important. Even assuming that petitioner is entitled to be heard on the Board's eligibility decisions, the opportunity for subsequent challenge to the validity of the election provided sufficient protection for the interest that petitioner claims to possess in the Board's investigation. *Mathews* v. *Eldridge*, 424 U.S. 319; *Dixon* v. *Love*, 431 U.S. 105. Petitioner's interests are not affected until the certification process is complete and all challenges have been resolved. There is no "temporary" or "interim" deprivation that could occasion any need for prior notification. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339.

This Court frequently has held that the requirements of the Due Process Clause are flexible. They may be satisfied by informal procedures involving little more than personal discussion. See, *e.g.*, *Memphis Light Gas & Water Division* v. *Craft*, No. 76-39, decided May 1, 1978; *Board of Curators of the University of Missouri* v. *Horowitz*, No. 76-695, decided March 1, 1978. The procedures may be conducted on the written record in whole or in part. *Mathews* v. *Eldridge*, 424 U.S. 319; *Richardson* v. *Perales*, 402 U.S. 389. Here written proceedings were supplemented by a mediator's personal investigation. Petitioner does not point to any evidence it could have introduced only in oral proceedings, and it does not demonstrate that eligibility disputes are unsuited to resolution on written submissions, or that written submissions create an unacceptable risk of error. Petitioner consequently has not offered an adequate reason for the Court to reexamine its decision in *Railway Clerks*.

Congress intended the Board's procedures to be informal. Petitioner seeks to upset that congressional choice, but there is no adequate reason to do so, and its arguments in this regard should be addressed to Congress. *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 256 (C.A. 2), certiorari denied, 376 U.S. 913. The Board did not abuse the discretion afforded to it under the Act by investigating the employer's objections to the election on the basis of the employer's written submission rather than on the basis of a full adversary hearing. See *Railway Clerks*, *supra*, 380 U.S. at 667.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

DOJ-1978-08

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

vs.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

MOTION OF COMMUTER AIRLINE ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF COMMUTER AIRLINE ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

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Respondents.

MOTION OF COMMUTER AIRLINE ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the United States Supreme Court, the Commuter Airline Association of America respectfully moves this Court for leave to file the accompanying Amicus Curiae brief.

The consent of the attorney for the Petitioner herein, as well as the consent of the attorney for the Respondent National Mediation Board, has been obtained, but the attorney for the Respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has refused to consent to the filing of a brief by the Commuter Airline Association of America as Amicus Curiae.

The Commuter Airline Association of America, and its approximately 100 commuter air carrier members, are vitally concerned with the basic issue presented in SMB's petition for writ of *certiorari*. At issue are the National Mediation Board procedures for investigation of representation disputes under the Railway Labor Act, 45 U.S.C. 151, *et seq*.

In its brief, Petitioner has directed its argument primarily to the failure of the National Mediation Board to meet its statutory duty to investigate issues arising in a representation dispute. While Petitioner has addressed the constitutional issue, the Amicus Brief more fully addresses the issue and its effect on the industry as a whole. The constitutional arguments made in the Amicus Curiae brief are central to the disposition of this matter and will not otherwise be fully set forth before this Court. If this argument is approved by this Court, the decision of the courts below must be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

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Respondents.

BRIEF OF COMMUTER AIRLINES ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS CURIAE

The Commuter Airlines Association of America ("CAAA") is a trade association whose regular members are comprised of a commuter air carrier as defined and classified in Part 298 of the Civil Aeronautics Board's Economic Regulations. Petitioner Sedalia-Marshall-Boonville Stage Line, Inc. ("SMB") is a CAAA member. The ap-

proximately 100 CAAA members operate throughout 48 of the states of the union and in its territories and virtually all members are subject to the Railway Labor Act, 45 U.S.C. 151, *et seq.*[1]

CAAA members are vitally concerned with the issues presented in SMB's petition for writ of *certiorari*. At issue are the National Mediation Board ("NMB") procedures for investigation of representation disputes under the Railway Labor Act and the extent to which there may be judicial review of NMB determinations. The NMB in this case, without notice or opportunity for SMB to be heard, excluded three employees from participation in a representation election. There was a one-vote margin in the election and the votes of the three employees excluded from eligibility could affect the results of the election.

The facts of this case reveal a breach of the NMB's duty to investigate the representation dispute and a denial of fundamental due process and this concerns and could affect each CAAA member subject to the representation procedures of the Railway Labor Act.[2]

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1. CAAA members play an increasingly vital role in domestic, territorial and international air commerce. The growth of the commuter industry is reflected in the fact that commuter traffic increased from four million two hundred and sixty-nine thousand six hundred and three (4,269,603) passengers in calendar year 1970, to eight million five hundred thousand (8,500,000) passengers in the calendar year 1977, an average annual rate of growth well in excess of 10%. The commuter carriers operate in 1,469 passenger markets and serve 747 airports. Aviation Daily, Vol. 237, Nos. 31 & 43, pp. 245-46, 343 (1978).

2. After the application for representation was filed, SMB cooperated with the NMB by providing it with a list of its pilots and copilots and supplying information regarding the duties of certain pilots pursuant to inquiries by the NMB. (R.53-54). No inquiries were made regarding Messrs. Barber, Milner or Worden; nor was SMB informed of any issues regarding them. (R.9, 54-55).

After the election was held, SMB discovered that 9 pilots' names had been stricken from the eligibility list and two former

(*Continued on following page*)

The district court below was not satisfied with its decision and Judge Stewart frankly so stated:

> The Court is not satisfied with the result it feels compelled to reach under the authorities. Defendants state that at the present time we are not "in tune" with the circumstances existing when the Railway Labor Act created the NMB. *I believe it is more accurate to state the NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts.* Had standing been shown, serious due process questions would have been presented. Perhaps Congress or the appellate courts will take steps to remove this anachronism. *See*, the chastisement of the NMB in *International In-Flight Catering Co., Ltd.* v. *National Mediation Board*, decided by the Ninth Circuit June 10, 1977. (Emphasis supplied).

Footnote continued—

pilots had been added. Among the 9 were Messrs. Barber, Milner and Worden. (R.54).

SMB promptly protested the election on the grounds that certain employees had been declared ineligible and other former employees declared eligible, without notice or an opportunity for SMB to be heard. (R.36). The NMB cursorily responded that the protest was untimely and that SMB was not a party to the proceedings. (R.37-39).

SMB then filed a written application with the NMB seeking vacation of the certification and an investigation regarding the eligibility of employees Barber, Milner, Worden and Reaves, and former employee Shaw, setting forth facts supporting their requests. (R.43). The NMB responded that the application was denied in "executive session", that its original determination regarding the employees was proper, and that while Shaw had been improperly included, he had not cast a ballot and the outcome of the election was therefore not affected by the error. (R.47).

Before instituting a suit in District Court, SMB tried unsuccessfully to obtain information regarding the NMB's investigation. (R.58-59). In its answer to the suit, however, the NMB admitted that it had *no* facts from any source supporting its decision regarding Messrs. Barber, Milner and Worden and that it had summarily denied SMB's post-election application. (R.9, 59).

Neither was the Court of Appeals satisfied with the decision. Noting its agreement with Judge Stewart, the Court of Appeals further declared that:

> *It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort.* The protections afforded a noncarrier employer by the National Labor Relations Act are much to be preferred. But the responsibility to make that decision rests with Congress and not this Court.

574 F.2d 394, 399, f.n. 5 (8th Cir. 1978) (Emphasis supplied).

The "statutes and cases interpreting them" do not permit unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort. The Railway Labor Act and the Fifth Amendment do not stand for this proposition. CAAA urges that this Court grant review, in order to clarify that rail and air carriers are entitled to basic procedural due process rights in NMB determinations of such importance as those involved in the case at bar.

There is no doubt that the principles of law involved in this case far transcend the effect on SMB and affect each air and rail carrier subject to the Railway Labor Act. If the NMB is permitted to continue a procedure of deciding potentially determinative issues without any notice or opportunity for carriers to be heard, then the situation will continue to exist wherein a union may be unilaterally and arbitrarily imposed upon a carrier and its employees without affording to them any of the currently accepted principles of due process, a situation considered *unsatisfactory* by the District Court below and *unfortunate* by the Court of Appeals.

ARGUMENT

I. The Case at Bar Creates a Conflict in the Circuits.

The decision in this case by the Court of Appeals for the Eighth Circuit is in direct conflict with the recent decision of the Court of Appeals for the Ninth Circuit in *International In-Flight Catering Company, Ltd.* v. *NMB*, 555 F.2d 712 (9th Cir. 1977).

The Ninth Circuit, in *In-Flight Catering*, has adopted a standard of review under the Railway Labor Act which permits judicial inquiry into the merits of the case in order to determine whether the NMB has fulfilled its statutory duty to investigate a representation dispute.

The Eighth Circuit, on the other hand, in the case at bar, adopted a very limited standard of review which requires that there be a "gross violation" of the NMB's statutory duty to investigate before it can review a certification or otherwise interfere with NMB processes and decisions. 574 F.2d 394 (8th Cir. 1978).

The Eighth Circuit's restrictive scope of review under the Railway Labor Act is unwarranted and CAAA urges this Court to resolve this conflict between the circuits.[3]

SMB has fully addressed this issue in its petition and CAAA, therefore, does not specifically address the issue here. CAAA does, however, fully support the position set forth by SMB.

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3. CAAA does not concede that the instant case does not call for judicial review even under the Eighth Circuit's restrictive standard for review. The record evidence reveals an egregious set of circumstances fully justifying a conclusion of gross violation of the NMB's statutory duty to investigate.

II. The Court of Appeals' Decision in the Case at Bar Raises Substantial Constitutional Questions.

The crucial constitutional issue raised in this case is the extent to which a carrier is entitled to due process in the NMB's representation dispute proceedings. By affording the appropriate due process protections to carriers in such proceedings, the NMB's compliance with its statutory duty to investigate issues in representation disputes will be virtually assured.

The court below ruled that SMB was not entitled to any Fifth Amendment procedural due process rights in the NMB's eligibility determinations, and therefore not entitled to notice and an opportunity to be heard. 574 F.2d at 396. We demonstrate below that inasmuch as such NMB determinations can and do substantially affect a carrier's liberty and property, the decision marks a significant departure from this Court's long standing due process decisions and should be reviewed. *See, e.g., Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970); *Den* v. *The Hoboken Land and Improvement Co.*, 18 How. 277, 59 U.S. 277, 15 L.Ed. 372 (1855).

A. The Due Process Clause of the Fifth Amendment Prohibits the Federal Government From Depriving Any Person of Life, Liberty or Property Without Affording That Person With the Appropriate Protections Traditionally Associated With Justice and Fairness.

We begin with the root proposition that the Due Process Clause of the Fifth Amendment to the Constitution of the United States is a restriction upon the powers of all three branches of the Federal Government—Legislative, Executive and Judicial—as well as upon any administrative agencies created by those branches to implement and enforce their laws, orders or decisions, when the exercise of such powers may result in a denial of any person's life, liberty and property. *See, e.g., Den* v. *The Hoboken Land and Improvement Co., supra.*

The requirements of "due process" cannot be succinctly or categorically stated; nor can they be mechanically applied. The requirements in any given situation vary with the nature of that situation, due process being a flexible concept. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 47 L.Ed. 2d 18 (1976); *Hannah* v. *Larche*, 363 U.S. 420, 3 L.Ed. 2d 1307 (1960).

Relevant to a determination of the extent and nature of the requirements of due process in a particular case are such factors as (1) the nature of the alleged right involved, (2) the length of the possible deprivation, (3) the risk of an erroneous deprivation of the interest involved, (4) the nature of the proceeding, and (5) the government's interest including the fiscal and administrative burdens that the additional or substitute procedural requirement(s) would entail. *See, Mathews* v. *Eldridge, supra*; *Fusair* v. *Steinberg*, 418 U.S. 379, 42 L.Ed. 2d 521 (1975); *Hannah* v. *Larche, supra.*

Generally speaking, when the governmental action is administrative in nature, the proceedings need not precisely follow the judicial model of an evidentiary hearing. *See, e.g., Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 95 L.Ed. 817 (1950) (Frankfurter, J., concurring). Moreover, just as the requirements applicable to an administrative proceeding can differ from those applicable to a judicial proceeding, the due process requirements can also vary with the nature of the particular administrative proceeding involved, and whether the administrative action is adjudicatory or regulatory in nature is important in determining the nature and extent of the due process

protections required. Where the administrative function is adjudicatory, applying set standards to an individual case, the due process requirements are more stringent than where a rulemaking function, which sets standards generally applicable to a class, is involved. *See, Goldberg* v. *Kelly, supra*, at 268, *Greene* v. *McElroy*, 360 U.S. 474, 496-97, 3 L.Ed. 2d 1377 (1959); *Provost* v. *Betit*, 326 F. Supp. 920, 921-22 (D. Vt. 1971).

Although the precise requirements of due process may vary from case to case, according to the various relevant factors described above, the fundamental requirement of due process is the right to be heard "at a meaningful time and in a meaningful maner." *Mathews* v. *Eldridge, supra*, at 333; *Armstrong* v. *Manzo*, 380 U.S. 545, 14 L.Ed. 2d 62 (1965). That right was denied in the case at bar.

B. Direct Interests of a Carrier in the Results of an NMB Resolution of a Representation Dispute Are Sufficient to Require That Due Process Be Afforded to the Carrier Before Any Final Administrative Decision Which May Affect Those Interests.

The range of rights and interests embodied in the concepts of life, liberty and property, and protected by the Due Process Clause has been broadly defined. *See, e.g., Board of Regents* v. *Roth*, 408 U.S. 564 (1972). It has been recognized that the property interests protected by the clause extend well beyond actual ownership of real estate, chattels, or money. *Board of Regents* v. *Roth, supra*. Similarly, "liberty" has been held to include the right to contract, and its meaning has been described as "broad indeed." *Board of Regents* v. *Roth, supra*; *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551 (1972); *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L.Ed. 884 (1954).

In determining whether an aggrieved party has suffered a deprivation of a "protected interest," it is the nature and not the weight of the interest that is important, at least with respect to the threshold determination of whether due process of any kind is required, *Meachum* v. *Fana*, 427 U.S. 215, 49 L.Ed. 2d 451 (1976); *Board of Regents* v. *Roth, supra*, and the party claiming to be aggrieved must have some present, cognizable interest in the right claimed to have been deprived or to be subject to deprivation. *Board of Regents* v. *Roth, supra.*

A Railway Labor Act carrier faced with a representation dispute among some or all of its employees unquestionably faces substantial restrictions or deprivations of protected rights, and these rights can be and are affected by NMB decisions in craft or class and eligibility determinations.

The Court of Appeals below only noted that an NMB determination of one craft or class over another can impose an "additional" burden on the carrier, an imposition to which the court apparently ascribed little significance. 574 F.2d 394, 399. While it is true that a particular craft or class determination may impose only some "additional" burden on a carrier by including more employees in the craft or class than was originally anticipated, the effects can also be considerably more substantial. That is, by expanding or contracting the craft or class, the NMB's decision may well be determinative of the issue of whether the union has made the "showing of interest" necessary even to trigger the election process.[4] Similarly, the NMB's

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4. Where the employees are already represented, the application must be supported by a showing of proved authorizations by a majority of the employees. Where the employees are unrepresented, the required showing is only 35%. 29 C.F.R. Chapter X, §1206.2(a) & (b).

determinations with regard to the individual employee eligibility can have this same effect.

Decisions by the NMB regarding craft or class determinations and individual eligibility determinations can also have a determinative effect beyond whether or not a union has a showing of interest among employees. As in the case at bar, the NMB's decision finding three (3) employees ineligible to vote can result in a union obtaining a "majority" of the possible votes where it otherwise might not have obtained such a majority and would not have been certified.

In the above situations, the "burden" placed upon a carrier is substantially greater than that recognized by the Court of Appeals below. While in some situations the NMB's selection of one craft or class as opposed to another may add only an additional burden in that the carrier may be obliged to bargain concerning 125 employees as opposed to 100, *the situation can also be that the Board's determination is directly determinative of whether a union will receive certification at all.*

Unions are permitted to participate in representation dispute proceedings and, to that extent, have the opportunity to present evidence on appropriate craft or class determinations and on individual eligibility determinations. According to the Court of Appeals below, however, carriers may be denied this right. The NMB cannot be expected to reach a correct decision in these matters when it hears only from one interested party and does not afford the other side a chance to rebut the claims made.

The Court of Appeals below did not even consider the burdens placed on a carrier as the result of an NMB certification of a union as the bargaining representative. As this Court noted in *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 14 L.Ed. 2d 133 (1965) ("A.B.N.E."), it is true that the Railway Labor Act does not require a carrier to reach agreement with a certified union on any issue. *Virginia Ry. Co.* v. *System Federation*, 300 U.S. 515, 81 L.Ed. 789 (1936). Even so, however, a failure to reach an agreement can, in and of itself, result in severe losses to the carrier in terms of a loss of income, goodwill, etc. flowing from strikes and boycotts. *See, gen., International In-Flight Catering Company* v. *National Mediation Board, supra,* at 719.

In addition, while the carrier is not required to reach an agreement with any representative selected by its employees, it *is* prohibited from making any changes which relate to rates of pay, rules and working conditions unless and until it has satisfied the requirements of Section 6 of the Railway Labor Act (45 U.S.C. §§156, 182) by bargaining with the representative until it reaches either agreement or impasse. In the latter event, the parties are released by the NMB to resort to their respective economic strengths and while the carrier can then make the changes it wants, it must risk a strike or other work stoppage and the losses resulting therefrom in the process.

A myriad of items are covered by the phrase "rates of pay, rules and working conditions," including scheduling, work force size, subcontracting, selection of new equipment, crew complement and utilization of the work force and equipment, to name but a few. A restriction on any one of these areas has substantial impact upon the carrier's exercise of its liberty and property rights. In view of the highly competitive and progressive nature of the airline industry and the fact that it is "capital heavy," due process protections should be afforded to the carrier in any proceeding which may result in a deprivation or

restriction of the carrier's right to utilize its property as it deems necessary and proper.

A carrier also faces a deprivation or restriction of its liberty as a result of NMB determinations in a representation dispute proceeding. As this Court stated in *Board of Regents* v. *Roth, supra,* "liberty," as used in the Fifth Amendment, includes the right to contract freely and a deprivation of that right can be constitutionally affected only if due process is afforded to the aggrieved person. *See, also, Lynch* v. *United States,* 292 U.S. 571, 78 L.Ed. 1434 (1934). That the concepts of "liberty" and "property" include freedom in making contracts of employment, and that such freedom is "not to be struck down directly, or arbitrarily interfered with," is also well settled. *Prudential Insurance Co.* v. *Cheek,* 259 U.S. 530, 536, 66 L.Ed. 1044, 1051 (1921).

In the absence of a certified bargaining representative, a carrier is free to contract with its employees individually or on whatever basis it chooses. Moreover, it is free to alter the terms and conditions of the contracts if it deems a change to be desirable or necessary. Once a bargaining representative is certified, however, a carrier may no longer contract with its employees individually or on any other basis regarding "rates of pay, rules and working conditions" unless and until it either obtains the representative's agreement or is released by the Board to take unilateral action after impasse is reached. *See, e.g., Detroit and Toledo Shoreline Railroad Company* v. *United Transportation Union,* 396 U.S. 142, 24 L.Ed. 2d 325 (1969).

As if the above-discussed rights and interests alone were not sufficient to invoke the protections of due process, under the Railway Labor Act, a carrier also faces potential

criminal liability, otherwise nonexistent, for a violation of the bargaining obligations imposed upon it by certification of a collective bargaining representative. 45 U.S.C. §152, Tenth.

Thus, not only does a carrier face the necessary deprivation of life, liberty *or* property as a result of Board decisions in a representation dispute proceeding, but it faces possible deprivation of liberty *and* property, and is entitled to the protections of due process before a bargaining representative is certified.

C. The Representation Dispute Procedures Set Forth in the Railway Labor Act, As Implemented and Actually Applied by the National Mediation Board in This Case, Do Not Provide for the Due Process Protections Required by the Fifth Amendment.

While it is not doubted that the carrier in *A.B.N.E. may* have been afforded the due process protections required by the Fifth Amendment in that particular case, especially in view of the NMB extensive proceedings, the prior hearings in which the carrier was permitted to participate, and the amount of evidence actually submitted by the carrier and received and reviewed by the NMB, the result obtained in that case was a result of an administrative fiat and not any statutory or regulatory requirement or guarantee. The fact that the statute and administrative regulations are applied so as to comport with "any possible constitutional requirements" in one case does not establish the constitutional sufficiency of the procedures utilized in any other case, and no carrier is guaranteed to receive the protections that the carrier in *A.B.N.E.* received, as is evidenced by the case at bar.

In this case, there is no dispute regarding the pertinent facts. While SMB was informed of the existence of certain issues and given the opportunity to state and support its position regarding them, it was never informed of the resolution of, or even the existence of, other issues until the election process had been completed. While SMB protested this fact, the only response from the NMB was a self-serving and conclusory reaffirmation of the prior "eligibility decision". It presented no evidence to the trial court that it had taken any steps to actually investigate the issues, and, in fact, admitted that it had *no* evidence *from any source* establishing basic facts to support its decisions.

Even if SMB had been given an opportunity to present evidence after it requested reconsideration of the eligibility decisions in question, a postdetermination procedure affording an opportunity to be heard where such opportunity was denied originally does not satisfy due process in view of the additional burden of convincing the NMB to reverse its decision and set aside the already completed election which is placed on the carrier at the postdetermination stage. *See Armstrong* v. *Manzo, supra.*

Similarly, even if the NMB determination in the case at bar was correct, that fact cannot support a finding that there was no denial of due process. In *Fuentes* v. *Shevin,* 407 U.S. 67, 87, 32 L.Ed. 2d 556, 574 (1972), this Court stated that

> [t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits.

The constitutional defects of the NMB's discretionary investigative procedures in the case at bar are evident. With regard to the eligibility decisions in question, SMB was not afforded the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge, supra,* at 333. The only "meaningful" time is prior to the rendering of a decision on the issues, and to be heard in a "meaningful" manner requires, *a fortiori*, some *prior* notice of the existence of the issues as well as the assertions made by the opposing party regarding those issues. None of these protections were afforded to SMB, however, and, as a result, its freedom to contract and to utilize and manage its property has been and continues to be severely restricted.

While a consideration of the various factors declared by this Court to be important to a determination of whether sufficient due process has been afforded in a particular case is relevant to the question of the adequacy of, rather than the threshold question of the applicability of, due process, a consideration of these factors serves only to buttress the conclusion that SMB was denied due process.

As discussed above, a carrier faces substantial restriction or partial deprivation of its liberty and property rights in the NMB representation dispute proceedings, and these deprivations are of an indefinite and potentially permanent duration.[5]

Moreover, there is a substantial risk that the NMB will make an erroneous decision, as in the case at bar it was forced to admit to an error in one of the more

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5. Neither the Act nor the regulations explicitly provide for any decertification proceeding. As a result of the *A.B.N.E.* decision, however, it does appear that decertification can result in the limited situation where a second union challenges an incumbent union and less than a majority of the employees vote for both unions combined.

simplistic eligibility decisions that it made.[6] This risk of an erroneous deprivation of liberty or property rights becomes even more compelling when this Court's previous decision that such NMB determinations are not reviewable on their merits is considered. *Switchmen's Union of North America* v. *NMB*, 320 U.S. 297, 88 L.Ed. 61 (1943).

The only factor which could conceivably support the procedures used by the NMB in this case is the consideration of the government's interest and the burdens imposed on the government by requiring that due process protections be afforded to the carrier; and the governmental interest in expediency does not outweigh the right of a carrier to notice and an opportunity to be heard. In the Railway Labor Act, Congress gave instructions to the NMB that representatives should be certified within thirty (30) days of the invocation of its services. *A.B.N.E., supra*, at 668. However, this time restriction has never been recognized as a basis for a total denial of due process.

Even if Congress was enunciating a strong desire to resolve representation disputes expeditiously, this Congressional instruction should not be used to deny or restrict a carrier's rights to due process in view of the NMB's actual practice. It is doubtful, in recent years, that the NMB has ever had a year in which it certified election results within thirty (30) days of the filing of an application for representation in even a simple majority

6. The inadequacy of the current "fact finding" procedure is laid bare by this error since the issue involved in the admittedly erroneous determination was the employee in question's continued employment status. Had SMB been notified or consulted regarding this issue prior to the rendering of the original decision, the issue could have been quickly and correctly resolved in the first instance. If erroneous decisions occur in such simple issues, what assurance is there that more difficult issues involving factual questions such as job duties, functions and responsibilities can be correctly decided without the participation of the carrier, who has a more thorough knowledge of the facts than some outside union, person or organization.

of the cases handled. This observation is not meant as a criticism of the NMB, for it is submitted that this 30-day timetable is both unrealistic and unworkable in cases involving air and rail carriers, which very often involve hundreds, if not thousands, of employees in a single craft or class.[7]

Moreover, as many Railway Labor Act elections are conducted by mail ballot and allow at least three weeks for the voting process alone, it is easy to understand the impossibility of meeting the thirty-day timetable for reasons wholly unrelated to due process considerations. Mediator's Manual, §334.311.

That the thirty (30) day time frame is unrealistic in light of the NMB's actual practice is further evidenced by the case at bar. Here, the dispute involved a small, admittedly appropriate craft or class of approximately 60 employees. Nevertheless, the union was not certified until 71 days after the services of the Board were invoked.

Accordingly, apart from considerations of expediency, there are no other significant or undue burdens which would be placed on the NMB by holding that prior notice and an opportunity to be heard and to rebut evidence must be provided to the carrier, and that the NMB's decisions must contain basic findings of fact and supportive reasoning. The NMB currently incorporates notice and opportunity to be heard in some cases, without apparent difficulty, *see, e.g., Pan American World Airways, Inc.*, NMB File No. C-3712, Vol. 4, Determinations of Craft or Class, pp. 129, 130 (1967), and it should be required to do so in all cases.

7. Unlike the procedures under the Labor Management Relations Act, representation issues under the Railway Labor Act are handled on a system-wide basis and are not broken down on a smaller, fragmented basis. *Cf., Switchmen's Union, supra.*

III. The Court of Appeals Incorrectly Interpreted This Court's Prior Decisions As Holding That a Carrier Under the Railway Labor Act Is Not Entitled to Due Process of Law in Representation Disputes.

In spite of the foregoing considerations discussed in II, *supra*, the Court of Appeals below held that SMB was not entitled to due process and, thus, there was no denial of due process to SMB when the NMB did not notify the carrier of the existence of certain voting eligibility questions or give it the opportunity to be heard regarding those questions.

In so holding, the Court of Appeals stated a reliance upon this Court's opinion in *A.B.N.E.*, *supra*, at 666-667, quoting the following language therefrom:

> . . . the Act [does not] require that United [the carrier] be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board. [Bracketed material supplied].

A. The Court of Appeals Misread the Holding by This Court in the *A.B.N.E.* Decision.

Although the Court of Appeals below viewed this Court's *A.B.N.E.* decision as a broad constitutional decision applicable to all NMB proceedings relating to representation disputes, it was actually decided based on its particular facts. Despite the language quoted by the Court of Appeals, this Court's holding was that

> [i]n view of these considerations, [the carrier's extensive participation among others], we hold that the Board performed its statutory duty to conduct an investigation and designate the craft or class in which the election should be held and that it did so in a manner satisfying any possible constitutional requirements that might exist. [Bracketed material supplied].

380 U.S. at 668, 14 L.Ed. 2d at 145.

The holding was not that the carrier was unentitled to any due process protections as the Court of Appeals interpreted it. Rather, the clear import of the holding was that, in view of the extensive carrier participation in the proceedings, the necessary protections, whatever they might be, had been afforded.

B. The Court of Appeals Ignored the Obvious and Substantial Factual Differences Between the Case at Bar and the *A.B.N.E.* Decision Upon Which It Relied.

As noted above, this Court apparently decided the *A.B.N.E.* case on its particular facts. In its decision in the case at bar, however, the Court of Appeals ignored the multitude of significant factual distinctions between the *A.B.N.E.* case and the case at bar, which distinctions made *A.B.N.E.* inapplicable to this case.

In *A.B.N.E.*, the carrier was challenging the craft or class determination rather than individual eligibility

issues as were challenged in the case at bar.[8] Moreover, the carrier in *A.B.N.E.* had participated extensively in prior NMB hearings involving the propriety of the craft or class challenged and, in fact, had been permitted to participate extensively in the very proceedings out of which its challenge arose. Thus, the carrier was not claiming that it had not been given notice or opportunity to be heard; rather, it was seeking a more formal hearing.

In the case at bar, on the other hand, SMB did not participate in and, in fact, did not even receive notice of, the investigation of eligibility questions involving several employees.

---

8. Craft or class determination more closely resemble rule-making determinations than do individual eligibility determinations and *may* therefore require less stringent due process safeguards. *See Greene* v. *McElroy, supra.* It is CAAA's position, however, recognizing, of course, that no issues involving craft or class determinations are presented to this Court in the case at bar, that craft or class determinations are also adjudicative actions requiring substantial due process safeguards since they seek to apply general standards (e.g., communities of interest, functional integration, etc.) to particular individual cases. That the NMB itself views such determinations similarly can be seen from its own language in a craft or class determination rendered at almost the same time as this Court decided the *A.B.N.E.* case, to wit:

> The Board is cognizant of the fact that when it is dealing with controversies involving individuals functioning in a supervisory capacity, titles and responsibilities vary *accordingly to the internal organization of the Carrier.*
>
> * * *
>
> The Board recognizes changes in the dynamic and progressive airline industry, and although the Board may rely on past determinations in carrying out its duties and responsibilities, it must also consider the changes in the industry and that the functions of various job classifications change accordingly.

United Air Lines, Inc., NMB Case No. R-3806 (C-3461), Vol. 4, Determinations of Craft or Class of the National Mediation Board, p. 32 (1965).

These statements clearly reflect the Board's own views that it must apply general standards to individual cases in making craft or class determinations.

The two cases differ materially, then, since in *A.B.N.E.* only the sufficiency of the protections afforded to the carrier was being challenged, while in the case at bar the challenge involves a complete denial by the NMB of the carrier's due process rights. In view of this difference, the *A.B.N.E.* decision should not be applied to the instant case as if the two were identical.

IV. If the Court of Appeals Properly Interpreted the *A.B.N.E.* Decision, Then That Decision Should Be Reconsidered in Light of This Court's Other Due Process Decisions.

A. Congress Cannot Circumvent the Minimal Due Process Requirements of the Fifth Amendment by Legislative Action.

If the *A.B.N.E.* decision stands for the proposition ascribed to it by the Court of Appeals, that decision stands in conflict with this Court's other due process decisions. The language from *A.B.N.E.* quoted by the Court of Appeals refers to the fact that "the Act" (Railway Labor Act) does not require that the carrier be made a party to craft or class determinations and leaves to the NMB's discretion the extent to which, if any, a carrier will be allowed to participate. This Court, however, has repeatedly held that Congress is restricted by the due process requirements of the Fifth Amendment, even where it is exercising its plenary powers under another clause of the Constitution such as the Commerce Claus. *See, e.g., Greene* v. *McElroy, supra*; *Galvan* v. *Press*, 347 U.S. 522, 98 L.Ed. 911 (1953), *rehearing denied*, 348 U.S. 852, 99 L.Ed. 671. *See also U.S.* v. *Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927, 43 L.Ed. 2d 397.

Similarly, this Court has held that the fact that Congress prescribes a particular procedure to be followed does not automatically make that procedure "due process" as contemplated by the Constitution. This view was succinctly stated in *Den* v. *The Hoboken Land and Improvement Co., supra,* at 374:

> [t]he Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will.

Thus, it is clear that the mere fact that the Railway Labor Act authorizes the use of certain procedures, vests some discretion in the NMB and does not expressly designate the carrier as a party cannot serve to justify the denial of due process to a carrier; nor can the Railway Labor Act itself prescribe the minimum due process requirements. Rather, the protections of due process come into play when the carrier's liberty and/or property are threatened, irrespective of the desires, intentions and expressions of Congress.

B. Whether the Protections of Due Process Attach to a Given Situation Does Not Depend Upon the Person's Statutory Designation As a "Party" to the Proceedings Which May Result in the Deprivation of His Life, Liberty or Property.

In the *A.B.N.E.* decision, this Court, in holding that no particular form of hearing was required for the NMB's proceedings in a representation dispute, construed the language of Section 2, Ninth of the Railway Labor Act as excluding carriers from "party" status in such proceedings.[9] As noted above, however, Congress cannot circumvent the requirements of due process by resorting to legislative device, *see, e.g., Den* v. *The Hoboken Land and Improvement Co., supra,* and consistent with this holding, it has been further held that Congress cannot circumvent due process by the expedient of withdrawing jurisdiction from every court in which suits for enforcement of constitutionally protected property rights can be brought. *Miller* v. *Howe Sound Min. Co.*, 77 F. Supp. 540, 545 (E.D. Wash. 1948). Yet this very situation results from the Court of Appeals decision, based on this Court's strict construction of the term "party" in *A.B.N.E.* If the decision below is allowed to stand, Congress has effectively circumvented due process by excluding persons with constitutionally protected rights and interests from "party" status in administrative proceedings, which are, or can be, determinative of those rights and interests, and by withholding jurisdiction from the courts to review the decisions rendered in such proceedings. *See, Switchmen's Union of North America* v. *NMB, supra.*

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9. The term "party" is not defined in the Railway Labor Act.

That due process protections cannot be dependent upon the statutory bestowal or withholding of "party" status is also evident when the effects of a decision to the contrary are examined. Were the right of Congress to dispense or withhold due process as it sees fit to be judicially recognized or sanctioned, the Due Process Clause would be gutted of all real substance and only the illusory protections of due process "when, if and as prescribed by Congress" would remain.

C. Section 2, Ninth of the Railway Labor Act Can Be Construed So As to Comport With the Due Process Requirements.

We submit that Section 2, Ninth of the Railway Labor Act can be construed so as to avoid the undesirable conclusion that Congress has enacted a procedure which denies due process of law to carriers subject to the Railway Labor Act. Such a construction is judicially preferred and would be in keeping with this Court's standing "assumption" that "[w]here administrative action has raised serious constitutional problems, . . . Congress . . . intended to afford those affected by the action the traditional safeguards of due process." *Greene* v. *McElroy, supra,* at 507.

Such a construction can be reached through a process which does no harm to the legitimate purposes of the Railway Labor Act. Initially, the phrase "consistent with due process requirements" or "consistent with the applicable constitutional safeguards" can be read into the statutory language, as such language should, in any event, be implicit in all Congressional actions involving a potential deprivation of life, liberty or property.

Moreover, the term "party," as used in the Railway Labor Act, need not be read in the strictest sense of

a "party" to litigation or administrative proceedings. Rather, a fairer reading would be that the term is only used to encompass more conveniently the various forms which employees' representatives may take (*e.g.*, individuals, associations, corporations, etc.). That is, the preferred reading would be that the term "party" is used to denominate collectively those entities which normally are on one side of the dispute.

In support of this reading of Section 2, Ninth, we point out that construing the word "party" in the strict sense has the untoward but logically necessary result of excluding, in addition to carriers, the very employees whose rights the Railway Labor Act is intended to protect.[10] Surely employees can and should be parties to a representation dispute involving them if they so desire. They are at the very heart of the representation dispute. If that is the case, then there are already "parties" to the dispute other than those statutorily denominated as such by Congress and the term as used therein must be intended to be read in a sense other than the strictest sense of a "party" to an administrative proceeding.

CONCLUSION

For the foregoing reasons, the Commuter Airline Association of America as Amicus Curiae urges the Supreme Court to grant SMB's petition and to decide the extent to which air carriers are entitled to procedural due process

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10. This Court recognized this dilemma in *A.B.N.E.*, but did not have to resolve it because, as was noted, no issue concerning the "party" status of employees was presented to it for decision. *A.B.N.E., supra,* at 660.

of law in representation dispute proceedings determinative of their liberty and property rights.

Dated July 29, 1978.

Respectfully submitted,

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APPENDIX

Relevant Stautory Provisions

45 U.S.C. §152

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within 30 days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the name of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall

designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and the records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000.00, nor more than $20,000.00 or imprisonment for not more than six months or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for expenses of the courts of the United States: Provided That Nothing In This Chapter Shall Be Construed To Require An Individual Employee To Render Labor or Service Without His Consent, Nor Shall Anything In This Chapter Be Construed to Make The Quitting of His Labor By An Individual Employee An Illegal Act;

Nor Shall Any Court Issue Any Process To Compel the Performance By An Individual Employee of Such Labor or Service, Without His Consent.

45 U.S.C. §156

Carriers and representatives of the employees shall give at least 30 day's written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the 30 days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board had been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by §155 of this title, by the Mediation Board, unless a period of 10 days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. §182

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 or this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION OF COMMUTER AIRLINE ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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The Commuter Airline Association of America has moved for leave to file an *amicus curiae* brief in support of Petitioner's application for writ of certiorari, pursuant to Rule 42. Respondent has refused to consent to the Association's request and opposes the granting of leave to file for the following reasons.

Rule 42(3) sets forth the primary justification for permitting an entity not directly involved in the litigation to file a brief as an *amicus curiae*; namely, the presentation of facts or questions of law which might

not otherwise be adequately presented by the parties. However, in the Association's application, the issues which are identified as being "central to the disposition" of this case are the identical issues raised by the Petitioner.

Petitioner is competent to present the factual and legal questions at issue in this litigation to the Court. Petitioner's counsel represented Petitioner in the United States District Court for the Southern District of Iowa and argued the case before the United States Court of Appeals for the Eighth Circuit. Counsel has also represented Petitioner in a companion case which arose from the events underlying the dispute herein. See *International Brotherhood of Teamsters* v. *Sedalia-Marshall-Boonville Stage Line, Inc.*, No. 76-325-2, (S.D. Iowa 1978), *appeal docketed*, No. 78-1178, 8th Cir., April 17, 1978. Counsel is thoroughly familiar with the facts and questions of law presented in the instant case and has briefed and argued them in the courts below.

Thus, the Association will neither present new and relevant issues to the Court nor is the Association as qualified as Petitioner to present the factual information and legal arguments in support of those issues. If the Association's motion is granted, it will delay the disposition of the Petition and may encourage other industry groups to move for leave to file briefs as *amicus curiae*, thereby further delaying the Court's consideration of the Petition.

CONCLUSION

For all of the foregoing reasons, the motion of the Commuter Airline Association of America for leave to file a brief as *amicus curiae* should be denied.

Respectfully submitted,

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Respondents.

MOTION OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE

(Air New England, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., New York Airways, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., Western Air Lines, Inc., and Wien Air Alaska, Inc.)

AND BRANIFF INTERNATIONAL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND BRANIFF INTERNATIONAL AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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Respondents.

MOTION OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND BRANIFF INTERNATIONAL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of this Court, Airline Industrial Relations Conference ("AIR Conference") and Braniff International, hereby respectfully move for leave to file the attached brief as *amici curiae* in this case in support of the petition for certiorari. The attorney for the petitioner and the attorney for the respondent National Mediation Board have consented to such filing. The consent of the attorney

for the respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was requested but refused.

AIR Conference, its member air carriers and Braniff International are vitally concerned that the National Mediation Board should fulfill statutory and constitutional requirements in conducting representation proceedings to determine whether airline employees are to be represented by unions, the basic issue presented by the petition for writ of certiorari. The *amici* brief supplements the parties' briefs by presenting the reasons why certiorari should be granted in view of the extensive experience of these carriers with National Mediation Board representation proceedings and the substantial impact of their results on the carriers' operations.

Respectfully submitted,

MURRAY GARTNER
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BRIEF OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND BRANIFF INTERNATIONAL AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THE INTEREST OF THE AMICI CURIAE

In this case, as appears from the briefs of the petitioner and respondent heretofore filed, the National Mediation Board (the "Board" or "NMB") treated as ineligible to

vote in a representation election in the craft or class of pilots and co-pilots three persons identified as pilots by their air carrier employer. The record of what the Board did demonstrates both an absence of evidence on which the Board's determination was based and a lack of concern for the interests of the carrier.[1]

Airline Industrial Relations Conference ("AIR Conference"), comprising a large part of the United States airline industry,[2] and Braniff International are concerned that carriers not be made to suffer the "unilateral and arbitrary imposition of a union" on them, which the Court of Appeals for the Eighth Circuit said lay within the power of the National Mediation Board to do. AIR Conference and Braniff, therefore, urge this Court to grant the petition herein to review the determination of the Court of Appeals for the Eighth Circuit that the NMB discharged its duty to investigate and its determination that the carrier has no constitutional right to notice of the issues being

1. In its post-election response to the carrier's objections to the Board's eligibility determinations, the Board said that "as a matter of *courtesy* the Board may consider the position of a carrier . . ." (R. 44; emphasis added)

2. AIR Conference is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters, and to represent the member carriers with respect to legislative, judicial and administrative matters in those areas in the airline industry. See *Airline Dispatchers Ass'n* v. *CAB*, 506 F.2d 1321 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 988 (1975). Its present members include: Air New England, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., New York Airways, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Arlines, Inc., Western Air Lines, Inc., and Wien Air Alaska, Inc.

considered by the Board nor to an opportunity to be heard on those issues.

These serious statutory and constitutional issues are presented by undisputed facts. Upon application by the respondent International Brotherhood of Teamsters ("IBT") to represent pilots and co-pilots of the petitioner Sedalia-Marshall-Boonville Stage Line, Inc. ("SMB"), the Board requested a list of pilot and co-pilot employees from the carrier. Such a list was delivered; the Mediator discussed with the carrier the eligibility of two employees and ruled that they were mechanics. Thereafter, the carrier submitted a revised list omitting the names of those two employees. During the election period, the Board notified SMB that two employees on the revised list had been ruled ineligible.

The Board asked for no information from the carrier regarding three other employees, Barber, Milner, and Worden, whose names appeared on the revised list, and did not notify the carrier before the election that those three persons were ineligible to vote. Since the union won the election by one vote, obviously the votes of those three or any one of them could have changed the result of the election.

After the election, the carrier learned for the first time that Barber, Milner, and Worden had been ruled ineligible to vote as pilots. In response to the carrier's inquiry, the Board stated only that it had found that two of them were assistants to the Chief Pilot (and therefore presumably supervisory or managerial) and that the third performed non-pilot duties. At no time did the Board make any state-

ment or disclosure of the alleged evidence on which these findings, announced for the first time after the election, were made. There is nothing in the record to show that the Board received any evidence of the duties of these three men before the election.

QUESTION PRESENTED

Did the determination of the National Mediation Board that three employees were ineligible to vote in a representation election, with no record evidence of any facts underlying that finding and without notice to the carrier employer that their eligibility was in issue so that there was no opportunity for the carrier to present relevant evidence on this issue, violate the Board's statutory duty to investigate or deny the carrier due process, under the Fifth Amendment of the Constitution?

REASONS FOR GRANTING THE WRIT

I

On this record, the determination below that the National Mediation Board fulfilled its statutory obligation under the Railway Labor Act to investigate the dispute presented to it raises a serious federal question.

There is no doubt that the petitioner has standing to raise the question whether, in the representation dispute involving petitioner's employees, the NMB fulfilled its statutory obligation to investigate that dispute, and that the Courts have jurisdiction to review Board action for the

purpose of answering that question.[3] *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965) (*"Railway Clerks"* or *"ABNE"*); *International In-Flight Catering Co.* v. *NMB*, 555 F. 2d 712, 719 (9th Cir. 1977). In concluding that "the Board did undertake to 'investigate' the dispute and to designate who might participate in the election" the Court of Appeals pointed to the following facts (Pet., A-15):

> 1. The Board requested and received from SMB a list of 68 qualified pilots and co-pilots;
>
> 2. The NMB Mediator discussed with carrier representatives the eligibility of two particular employees;
>
> 3. After the meeting, SMB submitted a revised list of eligible employees omitting the two who had been discussed;
>
> 4. The NMB Mediator subsequently requested information about the work assignments and duties of three other specified employees, Brandon, Reeves, and Baxter;
>
> 5. SMB submitted a letter explaining the work of those three employees;
>
> 6. During the election period, the Board notified SMB that two more employees had been ruled ineligible; but

3. *Cf. International Association of Machinists* v. *NMB*, 425 F. 2d 527, 534-36 (D.C. Cir. 1970) and *Airline Dispatchers Ass'n* v. *NMB*, 189 F. 2d 685, 688-89 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951), for the impact of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, on jurisdiction to review decisions by the Board.

7. Contrary to what it did in respect of Brandon, Reeves, and Baxter, the Board did not request information from SMB about employees Barber, Milner, or Worden, nor did it inform SMB that their eligibility was contested.

On those facts, the Court of Appeals said that it agreed with the district court that "Plaintiff appears to be challenging the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board" (Pet., A-15). Respondent IBT also says "the petitioner's contention that the Board's investigation was insufficient rests on narrow, particularized facts concerning the purported voting ineligibility of three individuals and the Board's examination of their status", and, further, that petitioner, in effect, requests review of "discretionary administrative action turning on the agency's assessment of essentially factual issues" (Resp. Br. in Opp., 11, 14).

The difficulty with both the court's conclusion and the respondent's statement of the issue is that the record incontestably does not show any facts upon which the Board arrived at its post-election conclusion that the work duties of the three individuals made them ineligible to vote as pilots. This Court is not being asked to review the correctness of a finding made from certain facts. The Court is being asked to review a determination that an investigation was made concerning eligibility of three particular employees when the record shows that the investigation was confined to the qualifications of other employees. In short, the question is whether the Board has fulfilled its statutory

obligation to conduct an investigation, an obligation which this Court has described as "a duty to make such investigation as the nature of the case requires," *Railway Clerks,* 380 U.S. at 662 (footnote omitted), when nothing in the record shows that the Board had any facts[4] with respect to the three individuals whom it ruled ineligible to vote.

Apparently the Court of Appeals, too, was concerned with the rationality of a determination that an administrative record, showing examination of facts with respect to the eligibility of some employees and no facts with respect to others, was sufficient to establish that a proper investigation had occurred with respect to those others. The court, having recited the facts listed above, on which it concluded that the requisite investigation had indeed occurred, nevertheless went on to refer to a post-election letter from the Board to SMB. That letter states the conclusion that Barber and Milner each function "as an assistant to the chief pilot" and the additional conclusion that Worden "performs non-pilot duties" (Pet., A-16), despite a proffer of evidence to the contrary by the carrier (R., 42). Nothing in the letter indicates either the facts on which those conclusions were based, their source, or whether the Board had any such facts prior to the election (R. 44-48).

Nevertheless, because of that conclusory letter, empty of any reference to an administrative record of evidence sup-

4. To the incontestable extent that the Board's action is reviewable in accordance with the *Railway Clerk's* case, that review must be based "on the full administrative record that was before the . . . [agency] at the time . . . [it] made . . . [its] decision." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420 (1971) (Footnote omitted). So far as the record here discloses, there was no administrative record on the job duties of the three men ruled ineligible.

porting the conclusions, the Court of Appeals said that this case is like *WES Chapter, Flight Engineers' International Ass'n* v. *NMB,* 314 F.2d 234 (D.C. Cir. 1962). It quoted from that decision the statement that the appellant was "asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority" (Pet., A-17).

The opinion in *WES Chapter* makes clear that the facts on which the Board made its decision were known and that indeed, there, appellant was arguing for a different conclusion from those facts. Since there was an administrative record of those facts, the appellant there could not have successfully asserted that the Board had not investigated the dispute, although that ground for assertion of jurisdiction to review had not yet been formulated by *Railway Clerks.*

The challenge here is to the making of a dispositive eligibility determination without any record of the facts on which that determination was made.[5] If such deter-

5. In *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R.R.* v. *Missouri-Kansas-Texas R. Co.,* 320 U.S. 323 (1943), a companion case to *Switchmen's Union* v. *NMB,* 320 U.S. 297 (1943), this Court called attention to the duty of the Board to make eligibility determinations by referring (at 320 U.S. 336 n.11) to *Brotherhood of Railroad Trainmen* v. *NMB,* 88 F.2d 757 (D.C. Cir. 1936). In that case, the Court of Appeals ordered the NMB to give the contesting employees and union "a full hearing and then to reach a decision based only on evidence adduced at the hearing and supplemented by a finding of facts on which it rests its conclusion." 88 F.2d at 761. The Court of Appeals said "it is obvious that the Board acted in this dispute without affording appellants any real hearing, and this, it is needless to say, was the sort of arbitrary action which no court—when its jurisdiction is invoked—can approve." *Id.* Granting that a union and, perhaps, employees are parties to a representation dispute and thus entitled to a full hearing on eligibility issues, does the failure of the Board to have any administrative record on the job duties of employees it has ruled ineligible to vote nevertheless qualify as an "investigation" because the carrier, as a non-party, is not entitled to a full hearing?

(footnote continued on next page)

minations are indeed sufficient to satisfy the Board's statutory obligation to investigate issues presented to it in a representation dispute, all rail and air carriers are justifiably concerned that they may be ordered to recognize and bargain with representatives of their employees whose election may be the result of an eligibility list in which employees are improperly included or from which they have been improperly excluded.

The Court of Appeals disavowed any difference with the decision of the Ninth Circuit in *International In-Flight Catering Co.* v. *NMB,* 555 F.2d 712 (1977). Both courts agree that a representation determination by the Board may be set aside if that determination has been made without the investigation required by the statute. To the extent, however, that the Eighth Circuit has applied that principle by defining a non-investigation as an investigation, it is in conflict with the decision of the Ninth Circuit which declined to accept the Board's mere statement that it had conducted an investigation when it appeared that the Board had failed to investigate an important issue tendered to it.

II

The determination below that a carrier has no constitutional right to notice and opportunity to be heard in representation matters involving its employees which may seriously affect the carrier's property and liberty presents the substantial constitutional question of denial of due process under the Fifth Amendment.

A. This Court has preserved the question of the scope of the carrier's rights under the due process clause of the U. S. Constitution

Although this Court has held that under the Railway Labor Act carriers are not parties to representation proceedings, *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965), that interpretation of the statute does not answer the question whether carriers have a constitutional right to be heard in proceedings the result of which will have profound effects on the way in which they may do business.[6] In fact, in *Railway Clerks* itself, this Court alluded to the carrier's claim that it was constitutionally entitled to notice and an opportunity to be heard in a proceeding to determine craft or class. The Court held that

6. Petitioner's brief (p. 7) and the brief of the Commuter Airline Association of America (pp. 10-13) detail the restrictions on a carrier which result from the certification of an employee representative.

The statement of the Court of Appeals (Pet. A-19 n.5) that "It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort" cannot mean anything more than that a formal hearing to which the carrier would be a party is not required. The cases make clear that the Railway Labor Act requires an investigation of the dispute, not arbitrary action, and no decision of this Court applying the Fifth Amendment sanctions arbitrary action affecting a carrier's interest.

any such requirement had, in that case, been fulfilled, since the carrier had participated in the proceedings and had extensive opportunity to present facts and argument. (380 U.S. at 667-68)

In *Switchmen's Union* v. *NMB,* 320 U.S. 297 (1943), this Court said "*[a]ll constitutional questions aside,* it is for Congress to determine how the rights which it creates [under the RLA] shall be enforced." 320 U.S. 301 (emphasis added). In *Railway Clerks,* again, the Court said "we cannot say that the [carrier's] interest rises to a status which requires the full panoply of procedural protections." 380 U.S. 667. This Court, therefore, has not yet decided the *minimum* procedural protections to which a carrier is entitled under the Fifth Amendment in representation proceedings under the Railway Labor Act, particularly in proceedings to determine eligibility to vote.

B. A carrier is entitled to notice of a dispute and the opportunity to be heard prior to decision on eligibility questions about its own employees.

The Court of Appeals decision that SMB had not been denied due process relied heavily upon the following language from *Railway Clerks,* 380 U.S. 666-67:

> Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board.

> . . . [W]hile the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, we cannot say that the latter's interest rises to a status which requires the full panoply of procedural protections.

The Court of Appeals concluded by saying that the Board "has not failed to satisfy constitutional requirements because it did not further consult SMB or make SMB a party to the proceedings which designated the employee electorate" (Pet., A-18-19).

Apparently the Court of Appeals sought in its conclusion to parallel the conclusion of this Court in the *Railway Clerks* case, suggesting that while there may be a constitutional right to some participation by the carrier in eligibility determinations, just as there is in craft or class determinations, such consultation as the Board had afforded was sufficient. The two cases, however, are not parallel. The record in the *Railway Clerks* case shows that the Board had provided opportunity over a period of many years for the carrier to present all of the evidence and argument which it chose to give on the composition of the craft or class. The carrier knew the issues and presented evidence addressed to them. Here, the carrier did not know that there was any issue as to the eligibility of the three employees in question and was not given any opportunity to present relevant evidence as to their work duties.

Clearly, if the carrier is entitled to due process, the minimum procedure which would satisfy that requirement is one which would give the carrier notice of the issue and opportunity to present relevant facts. For, as this Court has stated in *Memphis Light, Gas & Water Division* v. *Craft*, —— U.S. ——, 98 S.Ct. 1554, 1564 (1978) quoting from *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976) (emphasis added):

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

By those tests, the serious restrictions on a carrier's freedom to do business which result from certification of a union, the serious risk that such restrictions will be imposed erroneously if the carrier is not aware of questions concerning the employment status of its own employees,[7] and the lack of burden on the Board[8] to seek relevant in-

7. In this case, the Board conceded after the election that it had erroneously included former employee Shaw on the eligibility list. (R., 46-47). That inclusion may have had an effect on the votes of others, since Shaw claimed to have been discharged for union activity. (R., 72-73).

8. In fact, the Board customarily looks to carriers to provide essential information in its representation proceedings. See, generally, the Board's volumes of Determinations of Craft or Class, and, particularly, with respect to eligibility determinations, *Eastern Air Lines, Inc.*, R-4809 (National Mediation Board, July 13, 1978). No persuasive argument can be made, therefore, that an obligation to inform carriers of eligibility questions and to elicit information from them will impede the Board's processes. On the contrary, the Board itself has recognized that that procedure is indispensable to it. The Board should not be permitted to regard such essential procedure as a "courtesy" to the carrier. It was that approach in this case which led the Board to believe that it could make eligibility determinations with respect to three employees without getting any information from the carrier or, so far as it appears, from anyone else.

formation from the one most likely to have accurate information[9] would appear to establish as a minimum requirement of due process that the carrier be made aware of eligibility questions and be given an opportunity to address those questions with facts.

Moreover, the carrier would seem to be entitled to a statement from the NMB showing that the eligibility decisions made are based on a specified record compiled during its investigation. Only in that way can there be assurance that the eligibility determinations are based on an evidentiary record. *See Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).

In sum, because of a carrier's substantial interest in the outcome of an eligibility dispute regarding its employees, a carrier is entitled under the Fifth Amendment to know the issues being considered, to be heard on those issues, and to have the Board's decision based upon an identifiable record.

Conclusion

The Court of Appeals held that the National Mediation Board complied with its statutory obligation and fulfilled any constitutional requirement with respect to the carrier

9. A representation "dispute" involving air carrier employees typically, as here, involves only one union as party to the proceeding. Employees who may not want the union typically are unrepresented. While the proceeding is an "investigation," not an adversary proceeding, obviously the applicant organization has no interest in presenting facts which would tend to defeat its application. And a Justice of this Court took note of the Board's "mistaken belief that its duty is to encourage collective representation in the airline industry" (380 U.S. at 677). Due process in the protection of the carrier's interest in a fair and impartial investigation would seem to require that the carrier be given an opportunity to present relevant facts.

in making its eligibility determinations. The Court, however, concludes by describing the results of the Board's procedures and actions as the "unilateral and arbitrary imposition of a union" on the carrier. Adherence to the intimations in this Court's decisions of what the statute and Constitution require could not possibly bring about such a result. The writ of certiorari, therefore, should be granted so that this Court can assure that determinations made in representation proceedings which fundamentally affect carrier operations are lawfully made in accordance with standards mandated by the statute and Constitution, and that safeguarding of the carrier's legitimate interests is not dependent merely upon the Board's "courtesy".

Respectfully submitted,

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